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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DUNCAN ENERGY COMPANY, NBB OIL & GAS PARTNERS (U.S.A.), AMERADA HESS CORPORATION, TYREX OIL COMPANY AND TURTLE MOUNTAIN GAS & OIL, INC.,
Petitioners,

v.

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION; THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL; THREE AFFILIATED TRIBES TAX COMMISSION; WILBUR D. WILKINSON, CHAIRMAN, TRIBAL BUSINESS COUNCIL; JOSEPH J. WALKER, TAX COMMISSIONER; AND MARCUS WELLS, JR., DIRECTOR, TRIBAL EMPLOYMENT RIGHTS OFFICE,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the absence of ongoing tribal proceedings, do this Court's decisions in *National Farmers Union* and *Iowa Mutual* require a federal court to abstain from deciding the federal question whether an Indian tribe has inherent sovereignty to exercise its civil regulatory jurisdiction to enforce tribal tax and Indian employment preference ordinances against those who are not tribal members doing business on land owned in fee by nonmembers whose predecessors acquired the land under an Act of Congress opening it to nonmember settlement?

2. Does Congress' abrogation of a tribe's inherent sovereign power over certain land within the original exterior boundaries of a reservation by generally opening that land to nonmember settlement divest the tribal government of civil regulatory authority over nonmember activity on that land so that the so-called second *Montana* exception serves as the foundation for a federal cause of action, or, even in the face of Congressional abrogation of tribal sovereign power, can a tribe possess civil regulatory jurisdiction over nonmember activity on nonmember-owned fee land based on this exception?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Duncan Energy Company, NBB Oil & Gas Partners (U.S.A.), Amerada Hess Corporation, Tyrex Oil Company and Turtle Mountain Gas & Oil, Inc. (hereinafter collectively referred to as "Duncan Energy") respectfully request, pursuant to 28 U.S.C. § 2101(c), that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the Order entered in this matter on June 8, 1994, A1, as

confirmed by denial of rehearing en banc July 19, 1994, A33.

OPINIONS BELOW

In an Opinion and Order of the United States District Court for the District of North Dakota, reported at 812 F. Supp. 1008 (1992) and reprinted in the Appendix to this Petition at A19 through A25, the trial court decided, *inter alia,* that, in part because there were no ongoing tribal proceedings to which it could defer, it was not appropriate for it to abstain from exercising its jurisdiction over the federal question raised by Duncan Energy challenging assertions of civil regulatory jurisdiction by the Tribes and it would not require the exhaustion of tribal remedies. Duncan Energy then moved for summary judgment on the merits, which motion the court granted in an unreported Memorandum and Order (printed in the Appendix at A26-A32, and entered as a Judgment on September 29, 1993. (Printed in the Appendix at A34-A36.) The Tribes appealed these decisions. The order of the panel of the United States Court of Appeals for the Eighth Circuit reversing the decision of the district court has been reported at 27 F.3d 1294 (8th Cir. 1994) and is printed in the Appendix to this Petition at A1.

JURISDICTION

The United States District Court had jurisdiction under 28 U.S.C. § 1331. The United States Court of Appeals for the Eighth Circuit had jurisdiction over the appeal under 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America, Amendment I, Amendment XV. Act of June 1, 1910, 36 Stat. 455. Act of August 3, 1914, 38 Stat. 681.

STATEMENT OF THE CASE

1. Duncan Energy owns and operates oil and gas wells on land owned in fee by nonmembers of the resident tribes within the exterior boundaries of the Fort Berthold reservation in North Dakota. Duncan Energy operates these wells under leases from the fee owners. The cost of obtaining these rights from the fee owners exceeded $188,145.00. A38. In reliance on the security of the rights given by the fee owners under these leases, Duncan Energy invested approximately $10,065,000.00 in the development of its wells on these fee lands. A38. Duncan Energy is subject to the oil and gas extraction and severance taxes levied by the State of North Dakota. A38. All aspects of Duncan Energy's operation of these wells, such as permitting, drilling and completing, conservation practices, sealing off freshwater strata, well abandonment and reclamation of well sites have been and continue to be regulated by the State Oil and Gas Division. A40.

2. Each of the wells is located within an area of the reservation, known as the Northeast Quadrant, which Congress in 1910 expressly opened to nonmember entry and settlement. Act of June 1, 1910 (36 Stat. 455) ("1910 Act"). A27. As a consequence of this and other acts of Congress, nonmembers now own 97.73 percent of the Northeast Quadrant. A28. See *Three Affiliated Tribes of the Fort Berthold Reservation v. United States,* 16 Ind. Cl. Comm. 341 (1965).

3. The Respondents are officers of the tribes located on the reservation who have been charged with implementing and enforcing the tribal ordinances which Duncan Energy has challenged as asserting sovereign authority in excess of that which the tribes possess.[1] The tribes located

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[1] **The trial court dismissed the Tribes, the Tribal Business Council, and the Tribal Tax Commission as defendants on the basis of sovereign immunity. A22. Since such immunity does not extend to officers allegedly acting in violation of federal law, the court denied the motion to dismiss the Respondents here.**

on the reservation are the Three Affiliated Tribes of the Fort Berthold Reservation, organized and federally recognized under the Indian Reorganization Act of 1934.

4. After many years of leaving the regulatory control of the Northeast Quadrant to the State, in the mid 1980's the Tribes amended their constitution to assert jurisdiction over the Northeast Quadrant and then enacted several ordinances asserting their extraconstitutional inherent sovereign powers over Duncan Energy's operations and the fee land on which they are located. A20, 28. The ordinances at issue here are a taxation ordinance which would impose a severance tax upon all oil and gas production from lands within the exterior boundaries of the reservation, whether owned by tribal members or nonmembers; an ordinance imposing a possessory interest tax which covers Duncan Energy's equipment and leases; and a Tribal Employment Rights Ordinance (TERO) which requires any employer, including private individuals and businesses, entering any contract to be performed within the exterior boundaries of the reservation to give preference in hiring to tribal members, without regard to the place of performance of the contract, the subject of the contract, or the parties to the contract.[2] A28.

5. Because of the adverse ecnomic impact these ordinances would have on their operations, which are already marginal, and since the Tribes' assertion of extraconstitutional sovereign authority exceeds the limits established by the Constitution, acts of Congress, and decisions

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[2] The Tribes' assertion of jurisdiction under these and other ordinances is not unlike many other Tribes' actions concerning a wide variety of issues. Predictably, since such assertions appear to conflict with the limits of tribal sovereign power, or, at best, to rest on a very tenuous, speculative, and shifting basis of authority, numerous suits have been filed to challenge such assertions. The district court judge in this case noted this in his first opinion. Duncan Energy, 812 F.Supp. at 1010. Currently, at least three suits have been brought by various entities and individuals contesting tribal assertions of sovereign authority in the Northeast Quadrant. A20.

of this Court, Duncan Energy brought an action in Federal District Court seeking a declaratory judgment on the federal question of whether the Tribes do in fact possess the sovereign authority they assert. The Tribes moved to dismiss, arguing that sovereign immunity shields all defendants from judicial scrutiny; that the court should abstain and require Duncan Energy to exhaust tribal remedies; and that since allegedly no tax assessments had been made, no justiciable controversy exists.[3] A21. On the abstention issue, Duncan Energy argued first that the doctrine was inapplicable, not least because there were no ongoing tribal proceedings and the issues presented were federal questions controlled by federal not tribal law. In addition, Duncan Energy argued that an exception to the doctrine exists where the tribe does not have sovereign authority to enforce the challenged ordinance by virtue of acts of Congress, such as the 1910 Act, which demonstrate Congress' intent to abrogate such extraconstitutional power over nonmember, U.S. citizens.[4] See *Three Affiliated Tribes,* 16 Ind. Cl. Comm. 341 (1965).

6. As to abstention, the district court noted that on the basis of comity this Court, in its cases on the issue,

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[3] The District Court quickly disposed of the first and last arguments, appropriately dismissing some defendants and finding a controversy invoking its federal question jurisdiction existed. These rulings were not appealed and are not at issue here.

[4] Below Duncan Energy asserted the source of this exception was a passage in *Iowa Mutual v. LaPlante,* 480 U.S. 9 (1987), discussing the basis of the federal policy of encouraging tribal self-government as Tribes' retention of some attributes of sovereignty "to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Iowa Mutual,* 480 U.S. at 14. While correct that the abstention doctrine of *National Farmers Union Insurance Co. v. Crow Tribe,* 471 U.S. 845 (1985), and *Iowa Mutual* does contain an exception for situations where the challenged assertion of authority exceeds the bounds of Tribes' sovereignty as limited by acts of Congress abrogating such authority, the source is perhaps more precisely located in the explicit exceptions the court recognized in these cases (*National Farmers,* 471 U.S. at 856 n.21; *Iowa Mutual,* 480 U.S. at 19 n.12).

had required defendants already in an ongoing proceeding in tribal court to exhaust remedies there before challenging the tribal court's jurisdiction in federal court. A23. After canvassing the divergent decisions on the matter in the Eighth, Ninth and Tenth Circuits, the district court distinguished this case from *National Farmers*, 471 U.S. 845 (1985), and *Iowa Mutual*, 480 U.S. 9 (1987), on the ground that "this is not a case where tribal (court)[5] jurisdiction is challenged, but a case where the power of the tribe to excise a severance tax is challenged." A24. It went on to say, "[t]his is not a case involving a 'purely internal tribal controversy.' Requiring the exhaustion of tribal remedies would not advance tribal self-government and tribal self-determination." A24. Therefore, it decided not to require exhaustion of tribal remedies.

7. Duncan Energy then moved for summary judgment, asserting that no material issue of fact was at issue and, on the established facts, it was entitled to judgment as a matter of law. The parties submitted factual information by affidavit and other documents, the Tribes arguing their submissions had established that a factual question exists concerning the severity of the impact of Duncan Energy's activities on tribal health, welfare, and political integrity, and Duncan Energy arguing that no genuine issue of material fact was raised. Venturing into what it termed

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[5] The word "court" has been parenthetically inserted here because the district court's distinction not only appears to be between the jurisdiction of a court to decide whether it has jurisdiction over a case brought before it (see C. Wright, *Handbook of the Law of Federal Courts* § 16 (1976), cited in *National Farmers*, 471 U.S. at 857, n.23) and the inherent sovereign authority of a tribal government but it also only makes sense if that is the distinction being made. In the Court of Appeals the Tribes presumed this to be the correct interpretation of this sentence, stating "the only other 'jurisdiction' the court could have meant is the Tribe's regulatory jurisdiction, i.e., the power to impose its tax and TERO laws, but then the sentence would make no sense since it would say in effect 'not X, but X.'"

the "snare-laden jungle of tribal government jurisdiction," the district court held that in light of this Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981), *Merrion v. Jicarilla Apache tribe*, 456 U.S. 130 (1982), *Duro v. Reina*, 495 U.S. 676 (1990), *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), and *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S.Ct. 683 (1992),[6] Duncan Energy was entitled to a declaratory judgment that the Tribes do not have the sovereign authority to impose the ordinances in question on their activities. A29.[7]

8. The Tribes appealed to the Eighth Circuit Court of Appeals, arguing *National Farmers* and *Iowa Mutual* required the district court to abstain and require exhaustion of tribal remedies, even though there were no ongoing proceedings. Alternatively, in the event the court correctly reached the issue on the merits, the Tribes argued it incorrectly decided the matter in favor of Duncan Energy because it had failed to show that "under no conceivable circumstances could the facts that might be proved within the scope of (the Tribe's) allegations make out a case that satisfies the *Montana* test." Tr. Reply brief at 4.

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[6] At the time the parties completed briefing on the summary judgment motion, *South Dakota v. Bourland*, 113 S.Ct. 2309 (1993) had not yet been decided.

[7] The District Court, Judge Conmy, in a manner reminiscent of another judge often confronted with such thorny issues and thereby very learned in them, Judge Isaac D. Parker (see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 200, n.10), actually stated his decisions in this case in much more colorful but still telling terms. For example, he noted that while there is little doubt tax revenue would be helpful to the tribes, "[n]o doubt George III had some worthy projects in mind in the 1770s, but taxation without representation was not popular with the colonists then and still doesn't seem terribly just." A31.

9. Duncan Energy argued abstention was not required under *National Farmers* because, among other things, there was no proceeding pending in any tribal forum (Appellee's Brief, p. 17), and, in any event, tribal sovereignty over the land area where its activities in question were taking place had been abrogated by Congressional Acts. (*Id.* at 18-30.)[8] Duncan Energy argued the so-called Second *Montana* exception, on which the Tribes relied as the sole basis for any authority they might have over Duncan Energy, had been interpreted by this Court as providing in special circumstances the basis for a federal cause of action by a tribe, but was not a source of inherent sovereign authority. (*Id.* at 43-46.)

10. The Eighth Circuit Court of Appeals reversed the lower court on both its abstention decision and its grant of summary judgment to Duncan Energy. As to the former, the court said that since "a federal court's exercise of jurisdiction over matters relating to reservation affairs *can* impair the authority of tribal courts, the Supreme Court has concluded that, as a matter of comity" exhaustion is required, even in the absence of ongoing proceedings since the matter arose on the reservation. A10, 12. (Emphasis added.) Citing *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) and other decisions.

11. The court did not address Duncan Energy's argument that Congress had plainly abrogated any inherent sovereignty the Tribes may have once had over the land on which the wells are located and therefore an exception to the doctrine applied.

12. In reversing the lower court's summary judgment decision, the Eighth Circuit noted the general principle that Tribes do not have civil regulatory authority over nonmember activity on fee land. The court then quoted the so-called exceptions from *Montana*:

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[8] In the Court of Appeals, Duncan Energy received amicus support from a telephone cooperative serving the Northeast Quadrant, some of its lessors, and the State of North Dakota.

> "A tribe *may* regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe, or its members, through commercial dealing, contracts, leases, or other arrangements.[9] A tribe *may* also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S. at 566. (Emphasis added)

13. According to the Eighth Circuit, "[i]t is the second *Montana* exception, protection against a threat to welfare, that the tribe raises as grounds for its taxing and regulatory actions.' " A8. It reversed the district court's ruling that the tribe's do not have the authority they assert based on this exception or any other source of sovereignty. In doing so, the Court of Appeals reasoned that the second *Montana* exception had been reaffirmed as a source of tribal inherent sovereign authority over any and all nonmember owned land, even that generally opened to settlement, as recently as the decision in *South Dakota v. Bourland,* 113 S.Ct. 2309 (1993).

14. In a concurring opinion, Circuit Judge Loken expressed concern with what he termed the "difficult exhaustion issue." A14. The concurrence identified three "problems" with requiring exhaustion in this case. A15. The first two deal with concerns over the proper procedure in cases such as this.[10]

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[9] This possible ground for tribal control is not present here.

[10] In the first, the concurrence simply noted that this court had decided a number of seminal cases illuminating the substance of tribal sovereign power without requiring exhaustion, including *Montana, Brendale,* and *Bourland.* The court noted that these cases concerned whether under one of the *Montana* exceptions a tribe could establish it had inherent sovereignty over nonmember activity. Thus, the concurrence pondered whether perhaps the court meant to except from the exhaustion procedure cases where a

The concurrence's third problem with requiring exhaustion, which it termed "the most serious," was:

> ". . . that here there is no case pending in the tribal court, as there was in both *National Farmers* and *Iowa Mutual.* Requiring 'exhaustion' in a forum not chosen by any party looks like a subversion of the 'virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.' *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976)." A17.

SUMMARY OF ARGUMENT

This case warrants review because, like a case now pending before the Court on a Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals, *Middlemist, et al. v. Babbitt, et al.,* No. 94-42, Petition filed July 5, 1994, it raises issues of nationwide importance concerning the proper functioning of the federal judiciary in exercising or refraining from exercising its federal question jurisdiction under the doctrine first enunciated in *National Farmers,* 471 U.S. 845 (1985). The decision below in this case, as in *Middlemist,* 19 F.3d 1318, affirming decision at 824 F. Supp. 940, represents an unprecedented expansion of the narrow circumstances in which a federal court can refrain from its "virtually unflagging duty" to adjudicate federal questions properly before it. *Colorado River,* 424 U.S. at 817. This expansion, which allows deferral

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tribe's asserted power rested on these exceptions to the general rule. It rejected this conclusion, but noted "the question is hardly free from doubt." The second concern dealt with the standard of review, if any, to be applied in a federal court action after exhaustion of tribal remedies. The concurrence noted the troubling aspect of a purely federal question being decided with finality in a non-federal forum—tribal administrative and judicial forums—over which federal courts lack statutory authority to review decisions. Thus, the concurrence argued it is "premature to determine what evidentiary or legal weight to ultimately give the tribal court's decision."

of federal jurisdiction even absent any ongoing tribal proceeding, conflicts with the premise of controlling decisions of this Court, which premise should be clarified. What is more, again like *Middlemist* but perhaps even more clearly, this case raises an important issue left undecided by the Court in *Montana* which interacts with the doctrine enunciated in *National Farmers.* Specifically, the Court should decide whether the so-called second *Montana* exception can in fact serve as the source of a tribe's extraconstitutional sovereign authority over nonmember activity on fee land even when Congress has abrogated such authority. If in fact this exception is a source of remaining tribal extraconstitutional authority, even when Congress has abrogated a tribe's sovereignty over certain land, the Court should clarify the circumstances in which it would operate to give tribes sovereign power.

There are 280 Indian reservations within the territorial confines of the United States.[11] Each tribe is a separate, extraconstitutional sovereign nation. Of the 780,028 people living on reservations, more than 47.3 [12] percent are not members of the resident tribe. These nonmembers own many millions of acres on these reservations as the result of congressional acts. *Brendale,* 492 U.S. at 436, n.1, opinion of Stevens, J. For the most part, these nonmembers make their living from this land or from leasing it, as here, or making other arrangements by which they derive value from their property right. Thus, these issues are of broad significance, both in terms of the number of people affected and in terms of the rights at stake, the proper functioning of the federal judiciary, and the authority of Congress over Indian affairs.

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[11] World Almanac & Book of Facts (1991) at 394.

[12] U.S. Department of Commerce, Bureau of the Census, News Release July 11, 1991, Table 1.

On the merits, Duncan Energy's arguments can be simply stated. First, as to abstention, ongoing proceedings in a tribal forum were an indispensable factor in the Court's decisions in *National Farmers* and *Iowa Mutual.* Absent such proceedings, for a federal court to require federal questions to be taken to tribal forums represents an unwarranted and unprecedented departure from the practice of federal courts in adjudicating federal questions and protecting federal rights. *Steffel v. Thompson,* 415 U.S. 452, 462-463 (1974). Indeed, it not only appears to be but is "a subversion of the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Duncan Energy,* concurrence of Loken, J., A17. Secondly, as to the second *Montana* exception, when Congress has abrogated whatever extraconstitutional inherent sovereignty a tribe may have once had over an area of land by generally opening it to nonmember entry (*Bourland,* 113 S.Ct. at 2316, 2318, 2320, n.15), it is illogical and unworkable to allow the resurrection of that extraconstitutional power when some activity begins there which a tribe asserts may negatively impact it. See *Three Affiliated Tribes v. U.S.,* 16 Ind. Cl. Comm. 341 (1965). Rather, like states, when such a situation arises, tribes should seek appropriate remedies in the appropriate forums, which would usually be federal.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE PREMISE AND RATIONALE OF THIS COURT'S DECISIONS AND REPRESENTS A RADICAL, UNJUSTIFIED DEPARTURE FROM THE USUAL COURSE OF FEDERAL PROCEEDINGS WHEN THE COURT IS ASKED TO ABSTAIN BUT THERE ARE NO ONGOING PROCEEDINGS.

Citing the decisions in *National Farmers* and *Iowa Mutual,* the Court of Appeals held the district court had no choice but to abstain from exercising its properly-invoked jurisdiction to decide the federal question before it and had to require Duncan Energy to exhaust tribal remedies even though there were no ongoing tribal proceedings. A12. Because it found the matter arose on the reservation, the Eighth Circuit ruled it had no choice but to defer. A12. This decision conflicts with both the Court's decisions in these cases, since they were premised on and analyzed in the context of ongoing proceedings, and the federal common law doctrines of abstention, *Younger v. Harris,* 401 U.S. 37 (1971) and *Colorado River,* 424 U.S. 800 (1976), on which these decisions were modelled.

For example, the opinion in *National Farmers* discusses the issue of exhausting tribal court remedies in terms of a rule of exhaustion which "will provide the *forum* [13] whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases of the challenge." *National Farmers,* 471 U.S. at 856. The reference to "forum" and the present tense of the verb used in this quotation reflect the fact that in *National Farmers* there

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[13] Black's Law Dictionary defines "forum" as "a court of justice, or judicial tribunal; a place of jurisdiction; a place of litigation. Place where remedy is pursued." The pertinent definition in the American Heritage Dictionary, 2nd College Ed. 1985, defines forum as "a court of law; tribunal." Forum, therefore, refers to a specific place or body for adjudication, not a sovereign entity. For a forum's jurisdiction to come under challenge, therefore, there must be a proceeding before it.

was a proceeding ongoing in a tribal forum. Perhaps more telling, the authority to which the Court adverted, especially C. Wright, *Handbook of the Law of Federal Courts* § 16 (1976), demonstrates that the issue in *National Farmers* pivoted on the fact that a proceeding was ongoing in tribal court. That section, entitled "Jurisdiction to Determine Jurisdiction" outlines the doctrines under which all courts have the power to determine their jurisdiction over cases before them. It presupposes an ongoing proceeding before the forum whose jurisdiction is under challenge. Similarly, in *Iowa Mutual* the court's opinion repeatedly referenced challenges to a tribal *court's* jurisdiction, recognizing the fact of an ongoing proceeding in that case. *Iowa Mutual,* 480 U.S. at 17, 19.

Thus, requiring the plaintiffs in these cases in federal court to first state their challenges before the tribal courts with control of the case, the Court merely accorded tribal courts the same respect due any other court in the same situation.[14] In applying this unremarkable rule to tribal courts, the Court in *National Farmers* and *Iowa Mutual* did not authorize the extension of this reasoning to the very remarkable position that federal courts may abdicate their authority and responsibility to decide federal questions simply because they involve questions of tribal sovereignty.

Without timely intervention by this Court, however, the defiance of the limits of tribal authority established by

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[14] To be sure, Justice Stevens noted in partial dissent in *Iowa Mutual* that requiring deferral by the federal court in that case amounted to giving tribal courts greater deference than federal courts afford state courts, raising the "anomalous suggestion" that tribal sovereignty exceeds that of states. *Iowa Mutual,* 480 U.S. at 21-22. In any event, the Court's rationale and the precedents on which it relied indicate the fact that proceedings were ongoing in tribal court was indispensable to its decision. To allow deferral absent ongoing proceedings would confirm the "anomalous suggestion" that tribes have sovereignty in some respect greater than states.

Congress, this Court and the Constitution [15] cannot be effectively challenged, and plaintiffs like Duncan Energy will be forced to either violate or comply with unlawful assertions of tribal authority. The doctrine of *National Farmers* and *Iowa Mutual* will have been extended from a procedural doctrine giving tribal courts equal deference with that accorded state courts into a shield behind which tribal governments may assert ever broader and legally untenable authority over nonmember activity on fee lands. If allowed to stand, this would again bring great uncertainty to an area of federal law which this Court has consistently been clarifying and refining over the last fifteen years. *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, —— U.S. ——, 112 S.Ct. 683 (1992); *South Dakota v. Bourland*, —— U.S. ——, 113 S.Ct. 2309 (1993). Thus, just as the Court has been defining the very narrow powers of tribal governments over nonmembers' activity on fee lands based on generally appli-

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[15] Of course, as the Tribes here pointedly noted below, their actions are not constrained as to nonmembers by the Constitution, as long as they are acting within their inherent sovereign power because tribes' governmental power, unique in the entire United States, is extraconstitutional. *Talton v. Mayes*, 163 U.S. 376 (1896). *Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978). Duncan Energy includes this as a limit on tribal power, however, because of its belief that as a non-tribal entity the Tribes do not have authority over its activities on nonmember fee land, in part because constitutional rights and guarantees prevent the exercise, within the territorial confines of the United States, of such unbounded power over them, particularly by a sovereign not fitted within the constitutional structure, *United States v. Kagama*, 118 U.S. 375, 379 (1886), *Oliphant v. Schlie*, 544 F.2d 1007, dissent of Kennedy, J., at 1014, n.3 (9th Cir. 1976), and to which nonmembers have not given, and cannot give, their consent. See *Duro v. Reina*, 495 U.S. 676, 694 (1990).

cable principles, tribal assertions of authority in blatant conflict with those principles will go without timely federal adjudication and potentially without any substantive review at all.[16]

II. WHETHER A TRIBE MAY EXERCISE ITS SOVEREIGNTY, EVEN WHEN CONGRESS HAS ABROGATED IT, OVER NONMEMBER ACTIVITY ON FEE LAND UNDER THE SECOND *MONTANA* EXCEPTION REPRESENTS AN INCREASINGLY IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

The Tribes' sole source for its asserted sovereignty over Duncan Energy's operations is the so-called second *Montana* exception. In *Montana* the Court noted, after establishing that as a general principle tribal governments do not have power to regulate the activity of nonmembers on nonmember-owned fee land, in large part because Congress could not have intended the opposite result,[17] that

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[16] After exhausting tribal remedies, the court said a federal court could review the tribal court's determination that it had jurisdiction but, citing to the Ninth Circuit decision in *FMC Corp. v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990), said review of the legal question would be de novo but review of the factual determinations underlying it "under a deferential, clearly erroneous standard." A11. Thus, the Eighth Circuit, like the Ninth Circuit, would remit a plaintiff raising a federal question concerning a "reservation affair" to tribal forums in all circumstances, even when there are no ongoing proceedings in tribal forums, and would deprive that plaintiff of the right to have the crucial factual determinations, on which all legal decisions turn, made in tribal court. See Redish, *Federal Jurisdiction*, 2d Ed. (1990) 305-306; Wright, *Federal Courts*, 4th ed., 306: "How the facts are found will often dictate the decision of federal claims." (Citation omitted.)

[17] See *Montana*, 450 U.S. at 559, n.9: "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction. . . ." See also *Brendale*, 492 U.S. at 437, concurring opinion of Stevens, J.

in certain circumstances a tribe might nevertheless have some authority over nonmember activity.

> "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

As the plurality in *Brendale* noted, the Court did not say tribes do in fact have sovereign authority in such exceptional circumstances. *Brendale*, 492 U.S. at 428-429. Rather it said, they may, i.e. this possibly was a source of some tribal control.[18] Noting the conditional aspect of this possible exception—that authority under it would continue only so long as did negative impact on the tribe—the plurality argued such "uncertainty . . . would not further the interests of either the tribe or the county government and would be chaotic for landowners." *Id.* at 429-430. Thus, the plurality concluded that upon a sufficient showing of negative impact from nonmember activities *Montana* should be read to suggest the tribe would have a federal cause of action. *Id.* at 430.

Concurring with the plurality as to the Tribes' lack of sovereignty over nonmember land in an "open" area of the reservation, Justices Stevens and O'Connor did not address the possibility that the second *Montana* exception could serve as a basis for tribal authority. Rather, the concurrence emphasized the Tribes' loss of the right to exclude nonmembers, and their consequent inability to determine the basic character of the area. The concurrence then stated a key distinction between the effect of Congressional acts generally opening an area within a reservation and the acquisition of scattered parcels:

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[18] **Similarly, the Supreme Court of South Dakota in addressing a tribal jurisdiction issue recently stated: "*Montana* went on to note, without deciding, that a tribe may have other authority as well. . . ." *Red Fox v. Hettich*, 494 N.W.2d 638, 646 (1993).**

> "Although it is inconceivable that Congress would have intended that the sale of a few lots would divest the tribe of the power to determine the character of the tribal community, it is equally improbable that Congress envisioned that the tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy." *Id.* at 437.[19]

In *South Dakota v. Bourland*, 113 S.Ct. 2309 (1993), the Court appeared to have resolved the distinctions between the analyses of the plurality and the concurrence in *Brendale*. The composition of these differences hinged on whether Congress had broadly opened a reservation, or a part thereof, to nonmembers. If it had, then it had abrogated tribal sovereignty over nonmember fee land in this area and the reality is that the tribe's extraconstitutional, inherent sovereignty no longer reaches it. *Id.* at 2316, 2318, 2320, n.15.

This comports with, but is less sweeping than, the *Brendale* plurality's analysis that tribes simply cannot exercise sovereign authority over nonmember activity on fee land, and the second *Montana* exception would, therefore, give rise to a cause of action to vindicate a protectible interest in federal court. It also comports with, but is more categorical than, the *Brendale* concurrence's distinction between isolated parcels, the sale of which Congress could not have intended to result in an abrogation of tribal sovereignty, and areas more generally opened up which later became populated by nonmembers. Since the *Brendale* concurrence found no tribal sovereignty over the open area but remained silent as to the second *Montana* exception, it seems reasonable to conclude that the concurrence agreed with the plurality on this issue—that the

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[19] Concluding the concurrence as to the open area, Justice Stevens again emphasized, "it is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominantly owned and populated by nonmembers, who represent 80 percent of the population yet lack a voice in tribal governance." *Id.* at 447.

exception could give rise to a cause of action but not regulatory control—*as to this area.*

If this analysis is correct, the implicit resolution as to the second *Montana* exception in *Bourland* appears to have been that in a generally opened area nonmember activity on nonmember fee land could give rise to a cause of action in a tribe but not sovereign authority because Congress intended to and did abrogate tribal sovereignty over that area; but as to isolated parcels in a closed area, where Congress' intent would probably have been to leave the area, in general, in tribal control, the tribe would have retained sovereign authority to regulate, if necessary, nonmember activity on isolated nonmember-owned parcels which threatened the tribe.[20] The strength of such a resolution is that it rests on a realistic reading of Congress' intent.[21]

Both the grant of certiorari in *Bourland* to review a remand by the Court of Appeals for a determination of possible tribal authority based on the second *Montana* exception and numerous statements by the seven-member majority that Congress abrogated such authority indicate this is the correct analysis.

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[20] This analysis eliminates the logical anomaly of stating first that Congress had abrogated tribal sovereignty but in certain circumstances of a threat to the tribe that sovereignty would magically be resurrected without any action from Congress, lasting, however, only so long as did the alleged threat. Rather, the sovereignty exercised by a tribe over such an isolated parcel would never have been removed by Congress and therefore it could be asserted.

[21] Its weakness, potentially very significant to the individuals who could be affected by it, is that it does not address the constitutional implications of allowing extraconstitutional tribal governments to regulate the activity of nonmembers on nonmember land within closed areas. Provided the test for determining "broadly opened" and "closed" areas is clear, this may impact a relatively small number of individuals. The constitutional rights and principles at stake, however, are of the first magnitude. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), dissent of Stevens, J.

This proposition, however, is not certain. In remanding the case, the Court noted, "The question remains, however, whether the Tribe may invoke other potential sources of tribal jurisdiction over non-Indians. . ." *Id.* at 2320. This, despite the fact the Court granted certiorari to review the Court of Appeals' reversal and remand which itself was premised on the possibility of tribal authority arising from this exception.

Because the vitality of the second *Montana* exception, and, if it does have life, its effective reach, is unclear, many private individuals, tribes, and courts must take action without clear understanding of tribal inherent sovereign powers over nonmember activities. This case presents the opportunity to rectify that.

CONCLUSION

For these reasons, Petitioners respectfully request the Court to grant their Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit Court of Appeals.

Respectfully submitted,

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October 17, 1994

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3622

DUNCAN ENERGY COMPANY; NBB OIL & GAS PARTNERS (U.S.A.); AMERADA HESS CORPORATION; TYREX OIL COMPANY; TURTLE MOUNTAIN GAS & OIL, INC.,

Appellees,

v.

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION; THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL; THREE AFFILIATED TRIBES TAX COMMISSION; WILBUR D. WILKINSON, Chairman, Tribal Business Council; JOSEPH J. WALKER, Tax Commissioner, MARCUS WELLS, JR., Director, Tribal Employment Rights Office,

Appellants.

Appeal from the United States District Court
for the District of North Dakota

Submitted: January 13, 1994

Filed: June 8, 1994

Before BEAM, LOKEN and HANSEN, Circuit Judges.

BEAM, CIRCUIT Judge.

Wilbur D. Wilkinson, Joseph J. Walker, and Marcus Wells, Jr., officers of the Three Affiliated Tribes of the Fort Berthold Reservation ("the Tribe"),[1] appeal the district court's grant of summary judgment to various oil companies (hereinafter "Duncan Energy") challenging the Tribe's taxation and employment authority. The District court concluded that the Tribe lacked sovereign power to enforce the challenged tax statutes in the Northeast Quadrant of the Fort Berthold Reservation and enjoined the Tribe from enforcing the statutes against Duncan Energy. *Duncan Energy Co. v. The Three Affiliated Tribes,* No. A1-91-222, Judgment at 2 (D.N.D. Sept. 29, 1993). We reverse and remand to the district court with directions to either dismiss the case without prejudice for lack of exhaustion of tribal remedies, or to stay any proceedings pending an exhaustion of those remedies.

I. BACKGROUND

The Fort Berthold Reservation ("the Reservation") was created on March 3, 1891. 26 Stat. 1032. On June 1, 1910, after negotiations with the Tribe, Congress authorized homesteading in the Northeast Quadrant of the Reservation. 36 Stat. 455. Most of the land in the Northeast Quadrant is now owned in fee by non-Tribe members. Tribe members comprise slightly more than one-third of the overall population in the Northeast Quadrant, and almost half of the Tribe members living on the Reservation live in the Northeast Quadrant. Tribe members comprise slightly more than half of the population of New Town, the principal town in the disputed region. The Tribal Government is located primarily in New Town, as is the Bureau of Indian Affairs Office.

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[1] The district court dismissed the Three Affiliated Tribes, and the Tribal entities from this suit on the grounds of sovereign immunity. However, the real party in interest here is the Tribe. For convenience and clarity, we will refer to the remaining appellants in this case as "the Tribe."

Tribal law imposes a one-percent tax on all interests in real and personal property within the Reservation used for business or profit. Tribal Tax Code, Chapter 7. The tax is assessed on forty-five percent of the fair market value of the property. Tribal Tax Code § 706(3). Tribal law also imposes a gross production tax of one-percent on all oil and gas produced within the Reservation. Tribal Tax Code, Chapter 8. Furthermore, the Tribal Employment Rights Office Ordinance ("TERO") requires all employers within the Reservation to hire qualified Indian workers preferentially. The TERO prevents mineral developers from hiring non-Indian contractors unless no qualified, reasonably-priced Indian contractors are available.

Pursuant to leases from non-Indian landowners, Duncan Energy operates oil and gas wells in the Northeast Quadrant of the Reservation. Under Tribal law, Duncan Energy would therefore be subject to the oil and gas tax, the property tax, and the employment ordinance described above. Duncan Energy filed suit in the district court seeking to enjoin the Tribe from assessing or collecting taxes and from enforcing the TERO against their activities within the Reservation. The Tribe moved to dismiss or to remand the case to the Tribal adjudicative system. The district court concluded that Duncan Energy need not exhaust Tribal remedies before proceeding in federal court and granted Duncan Energy's motion for summary judgment on the merits. The Tribe appeals.

II. DISCUSSION

A. Reservation Boundaries

As its primary ground for affirmance, Duncan Energy contends that the 1910 Act, which opened the Reservation for homesteading, diminished the Reservation. If we were to adopt this contention, it would end our inquiry in this case; the Northeast Quadrant would no longer be part of the Fort Berthold Reservation, and the Tribes would not have jurisdiction to regulate activities there.

However, this court has previously ruled that the 1910 Act did not diminish the Reservation. *New Town v. United States,* 454 F.2d 121 (8th Cir. 1972). Duncan Energy suggests that *Solem v. Bartlett,* 465 U.S. 463 (1984), an intervening Supreme Court decision, nullifies our prior disposition of this issue. We disagree.

We are convinced that *Solem* did not articulate a new framework for analyzing questions of reservation diminishment. In rendering its decision, the *Solem* Court specifically noted that "our precedents in the area have established a fairly clean analytical structure." *Id.* at 470. *Solem* merely restates and applies this same analytical structure, albeit more concisely. Just this term, the Supreme Court revisited the issue of how to determine whether a Surplus Land Act diminished a reservation or merely offered non-Indians the opportunity to purchase land within established reservation boundaries. *Hagen v. Utah,* 114 S. Ct. 958 (1994). The Court reiterated the same longstanding legal framework employed in *Solem.* Our reading of *Hagen* and *Solem* only confirms our previous conclusion; the 1910 Act did not diminish the Fort Berthold Reservation.

Duncan Energy also contends that *New Town* was incorrectly decided, and directs the court's attention to *United States ex rel. Cook v. Parkinson,* 525 F.2d 120 (8th Cir. 1975), *cert. denied,* 430 U.S. 982 (1977) and to *Rosebud Sioux Tribe v. Kneip,* 521 F.2d 87 (8th Cir. 1975), *aff'd,* 430 U.S. 584 (1977) as support for the proposition that the 1910 Act diminished the Reservation. As a panel of the Eighth Circuit, we have no authority to overrule a previous panel's decision.[2] In any event, we do not find those cases instructive. Both cases cited by Duncan Energy involved different Surplus

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[2] We note that this Circuit has recently rejected a similar challenge to *New Town* in the context of a criminal case. *See United States v. Standish,* 3 F.3d 1207 (8th Cir. 1993) citing with approval *New Town v. United States,* 454 F.2d 121 (8th Cir. 1972).

Land Acts and it is settled law that some Surplus Land Acts diminished reservations while other acts did not. *Solem,* 465 U.S. at 469; *compare Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977) *with Mattz v. Arnett,* 412 U.S. 481 (1973). To determine whether a reservation has been diminished, we examine three factors: the statutory language, the historical context, and the population that settled the land. *Hagen,* 114 S. Ct. at 965, (citing *Solem,* 465 U.S. at 470-72.) Of the three factors, the statutory language is the most probative. *Solem,* 465 U.S. at 470. Throughout the inquiry, ambiguities are to be resolved in favor of the Indians, and diminishment should not be found lightly. *Id.; see also South Dakota v. Bourland,* 113 S. Ct. 2309, 2316 (1993).

The language of the 1910 Act does not lend itself to the interpretation urged by Duncan. In cases where courts have found diminishment of a reservation, the Surplus Land Act itself contained phrases unambiguously expressing congressional intent to diminish the reservation. *See, e.g., Hagen,* 114 S. Ct. at 966-67 ("restore to the public domain"); *Rosebud,* 430 U.S. at 591 n.8 ("cede, surrender, grant, and convey to the United States all [the Tribe's] claim, right, title, and interest"); *DeCoteau v. District County Court for the Tenth Judicial Dist.,* 420 U.S. 425, 439 n.22 (1975) ("cede, sell, relinquish, and convey to the United States all [the Tribe's] claim, right, title and interest"). No similar language appears in the 1910 Act which merely authorized the Secretary of the Interior to "surve[y] and to sell and dispose of . . . all the surplus unallotted and unreserved lands within [a] portion of said reservation . . . ." 36 Stat. at 455.

The 1910 Act further authorized the Secretary to reserve land in the opened territory for schools and religious institutions to be maintained for the benefit of the Tribe. *Id.* at 456. The Act also maintained the prohibition against the introduction of intoxicants into Indian Country

in the opened territory, *id.* at 458; reserved all timber rights in the opened territory for the Tribe, *id.*; reserved all coal rights in the opened territory for the Tribe, *id.* at 455; and specifically stated that the United States would act merely as "trustees for said Indians to dispose of said lands and to expand and pay over the proceeds received from the sale thereof only as received . . . ." *Id.* at 459. Considering similar statutory language and provisions, the *Solem* Court concluded that a reservation had not been diminished. *Solem*, 465 U.S. at 472-73.

We find the contrast between the provisions of the 1910 Act and the language employed in the 1891 Fort Berthold Treaty to be particularly illuminating. In the 1891 Treaty, the Tribe agreed to "cede, sell, and relinquish to the United States all their right, title, and interest in" a portion of the Reservation. 26 Stat. 1032. Thereafter, the Treaty referred to the "diminished Reservation" and provided for surveying to mark the new "outboundaries of the diminished Reservation." *Id.* at 1035. It would be contrary to the principle of resolving ambiguities in favor of the Indians were we to conclude that Congress intended the same meanings for the vastly different language employed in these two documents affecting the Tribe.

The district court acknowledged that it was bound to consider the land in question as part of the Reservation. *Duncan Energy Co. v. The Three Affiliated Tribes*, No. A1-91-222, Mem. Op. at 3-4 (D.N.D. Sept. 22, 1993). ("Adopting the position that the 1910 and 1914 acts [3] removed this area from the reservation would solve all the issues presented. The ink is hardly dry however on the decision in *United States of America v. Neil D. Standish*, filed September 7, 1993, wherein the 8th Circuit disposed of this argument in short order.") Having done so, the court concluded that population and fee ownership pat-

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[3] The 1914 Act opened the surface of coal lands for homesteading while reserving the underlying mineral rights for the Tribe. 38 Stat. 681.

terns in the Northeast Quadrant resulted in a de facto exclusion of that area from most aspects of Tribal jurisdiction. We find this exclusive reliance on the third *Solem* factor to create a quasi-diminishment totally inappropriate.[4]

B. *Montana* Factors

Reaffirming that the Northeast Quadrant remains a part of the Reservation does not end our inquiry in this case. The Supreme Court has determined that the sovereign power of Indian tribes to regulate the activities of non-tribe members on non-Indian fee-lands is limited. *See Montana v. United States*, 450 U.S. 544 (1981).

Montana set out the standard for determining whether an Indian tribe's regulatory activities constitute an exercise of its remaining sovereign powers or an unwarranted intrusion into areas outside the tribe's jurisdiction. In *Montana*, the Crow Nation sought to prohibit fishing and hunting by non-Tribe members within the Crow Reservation. The Supreme Court rejected the sovereignty justifications raised by the Crow Nation and ruled that absent an express congressional delegation, the challenged regulation must fail. *Id.* at 565. However, the Court did not decide that a tribe never has the authority to regulate the conduct of nonmembers. Instead, the Court noted:

> [t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction

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[4] We are not convinced that the district court correctly concluded that the third *Solem* factor weighed in favor of Duncan. While it is true that the land in the Northeast Quadrant is owned almost entirely by non-Tribe members, it is also true that the seat of Tribal government is located there and that a significant percentage of the Tribe members who live on the Reservation live in the Northeast Quadrant. We also note that the Tribe owns all of the coal beds underneath the Northeast Quadrant. Because we believe that the language of the 1910 Act was not intended to, and did not in fact, diminish the Reservation, we need not further analyze this issue.

> over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe, or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66 (citations omitted). It is the second *Montana* exception, protection against a threat to welfare, that the Tribe raises as grounds for its taxing and regulatory actions.

As support for its claim that the Tribe acted impermissibly, Duncan Energy relies heavily on *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989). In *Yakima Nation*, the Supreme Court reviewed the district court's application of the *Montana* exceptions in three cases consolidated for review. A majority of the Court concluded that in two of the cases the zoning ordinance did not rise to the level of a regulation designed to protect against a threat to welfare as described in *Montana*. *Id.* at 432. In the third case, a different majority of the Court upheld the Yakima Nation's regulatory authority under the second *Montana* exception. *Id.* at 444. In the case before us, the applicability of the *Montana* exceptions is one of the unresolved questions. Due to this difference in the posture of the case, and to the vastly different claims raised as support for the regulations, *Yakima* is of limited assistance to our inquiry. We note that Justice Stevens, who joined both majority opinions in *Yakima*, emphasized that the decisions turned on the specific facts of each complaint. *Id.* at 447.

Since *Yakima* was decided, the Supreme Court has again addressed the issue of tribal authority to regulate activities on non-Tribe member fee lands and has reaffirmed the exceptions to the general rule, articulated in *Montana*, that Indian tribes cannot exercise sovereignty over nonmembers. *See South Dakota v. Bourland*, 113 S. Ct. 2309 (1993). In *Bourland*, the Sioux Nation sought to regulate all hunting and fishing on the Cheyenne River Reservation, including hunting and fishing by non-Tribe members in the Oahe Dam and Reservoir recreation area. The Court concluded that by taking Reservation land for the dam project, and then by opening the reservoir for public use as a recreation area, Congress eliminated the Tribe's regulatory power over the lands. The Court also noted that the Flood Control Act of 1944, expressly transferred regulatory authority over the dam and reservoir to the Army Corps of Engineers.[5] *Id.* at 2317. Despite these conclusions, the Supreme Court remanded *Bourland* for an analysis of the case in light of the *Montana* exceptions.

Based on our analysis of *Montana* and *Bourland*, we find summary judgment clearly inappropriate in this case. The Northeast Quadrant is part of the Reservation, and the Tribe argues that its regulations are permitted under the second *Montana* exception. We make no judgment as to the merits of the case, but hold that the district court erred by failing to analyze the applicability of the *Montana* exceptions and by finding this exercise of regulatory authority to be impermissible as a matter of law.

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[5] We note that *Bourland* presents a much stronger case for a finding of no Tribal regulatory authority than does this case. The land at issue in *Bourland* had been opened as a public recreation area, and a federal agency had been expressly granted regulatory authority over the land. While rejecting the Tribe's claim that even under these facts its inherent sovereignty enabled it to regulate hunting and fishing, the Supreme Court expressly reserved the question of the Tribe's regulatory authority in other contexts. *Bourland*, 113 S. Ct. at 2316 n.9.

C. Exhaustion of Tribal Remedies

Duncan Energy contends that exhaustion of tribal remedies would be both unnecessary and futile. The Tribe, on the other hand, urges us to direct the district court to dismiss this case for failure to exhaust tribal remedies. We agree that exhaustion is necessary as a matter of comity in this case.

The Supreme Court has repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982). Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development. *Iowa Mutual*, 480 U.S. at 14-15. Civil jurisdiction over tribal-related activities on reservation land presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute. *Id.* at 18. The deference that federal courts afford tribal courts concerning such activities occurring on reservation land is deeply rooted in Supreme Court precedent. Because a federal court's exercise of jurisdiction over matters relating to reservation affairs can impair the authority of tribal courts, the Supreme Court has concluded that, as a matter of comity, the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).

In addition to encouraging tribal self-government, exhaustion of tribal remedies permits:

> a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed [in the federal district court] . . . . [It will also] encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will provide other courts with the

> benefit of their expertise in such matters in the event of further judicial review.

National Farmers Union, 471 U.S. at 856-57. Thus, the requirement of tribal exhaustion contemplates the development of a factual record that will serve the "orderly administration of justice in the federal court." *Id.* at 856.

Once tribal remedies have been exhausted, the Tribal Court's determination of tribal jurisdiction may be reviewed in the federal district court. *See Iowa Mutual,* 480 U.S. at 19. However,

> unless a federal court determines that the Tribal Court lacked jurisdiction, . . . proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Court.

Id. Therefore, on review, the district court must first examine the Tribal Court's determination of its own jurisdiction. This determination is a question of federal law that must be reviewed *de novo. See FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311, 1313 (9th Cir. 1990). However, in making its analysis, the district court should review the Tribal Court's findings of fact under a deferential, clearly erroneous standard. *Id.* The Tribal Court's determinations of federal law should be reviewed *de novo* while determinations of Tribal law should be accorded more deference. *Id.*

Duncan Energy contends that *National Farmers Union* and *Iowa Mutual* are inapplicable to cases involving fee lands. We find such a limited reading of those cases to be inappropriate; nothing in the broad language employed by the Supreme Court indicates that the reasoning in *Iowa Mutual* and *National Farmers Union* applies only to similar factual situations. This court has previously interpreted *National Farmers Union* and *Iowa Mutual* to require exhaustion of tribal court remedies before a case may be considered by a federal district court. *City of Timber Lake v. Cheyenne River Sioux Tribe,* 10 F.3d

554 (8th Cir. 1993); *see also United States ex rel. Kishell v. Turtle Mountain Housing Auth.*, 816 F.2d 1273, 1276 (8th Cir. 1987) ("a federal court should stay its hand until tribal remedies are exhausted and the tribal court has had a full opportunity to determine its own jurisdiction"); *Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 674 (8th Cir. 1986).

Other circuits considering this issue have reached a similar conclusion. *See, e.g., Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991) (relying on *Granberry v. Greer*, 481 U.S. 129, 131 (1987) for the proposition that *Iowa Mutual* and *National Farmers* established "an inflexible bar to consider[ing] the merits of [a] petition by the federal court, and therefore requir[ing] that a petition be dismissed when it appears that there has been a failure to exhaust [tribal remedies]"); *Crawford v. Genuine Parts, Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) ("The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory. If deference is called for, the district court may not relieve the parties from exhausting tribal remedies."), *cert. denied*, 112 S. Ct. 1174 (1992). We find this dispute over tribal taxation and employment rights to be a dispute arising on the Reservation that raises questions of tribal law and jurisdiction that should first be presented to the tribal court. *See Weeks Constr.*, 797 F.2d at 673; *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 813 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993).

Duncan Energy also contends that any recourse to Tribal remedies would be futile because the Tribal Court will be biased in favor of upholding the taxes. The Supreme Court excepts from the general comity requirement situations where:

> an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be

> futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

National Farmers Union, 471 U.S. at 856 n.21. We note that Duncan Energy does not present any evidence of bias, but merely assumes that it could not receive a fair trial in the Tribal Court. The Supreme Court has declined to permit parties to excuse themselves from the exhaustion requirement by *merely alleging* that tribal courts will be incompetent or biased. *See Iowa Mutual*, 480 U.S. at 18-19 ("[t]he alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union*"); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 n.21 (1978). Absent any indication of bias, we will not presume the Tribal Court to be anything other than competent and impartial.

Finally, we note that the Tribe may have a heavy burden justifying these tax and employment statutes under the *Montana* exceptions, but that caveat does not alter our conclusion that this issue [6] is for the Tribal Court to determine in the first instance.

III. Conclusion

For the reasons stated above, the decision of the district court is reversed and the case is remanded to the district court. The district court should either dismiss this case without prejudice for failure to exhaust tribal remedies, or should stay any proceedings until those remedies are exhausted.

LOKEN, Circuit Judge, concurring.

I agree with the court that we are bound to follow *New Town* and that the district court erred in granting

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[6] At a minimum, we would be obliged to remand this case to the district court for an examination of the *Montana* exceptions. However, we are convinced that the better course is to defer to the Tribal Court.

summary judgment on the *Montana* exception issues. I am more troubled than the court by the difficult exhaustion issue. On balance, I conclude that *National Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845 (1985), is controlling and requires that we remand with instructions to stay this case until the parties have had a reasonable opportunity to present the *Montana* exception issues to the tribal court.

The *Montana* exceptions are standards for determining the extent of tribal power. Although most courts have looked at *National Farmers Union* as involving only tribal court jurisdiction, in fact the Supreme Court's focus was broader:

> This Court has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians. [Citing *Montana*] . . . In this case the petitioners contend that the Tribal Court has no power to enter a judgment against them. . . . [P]etitioners, in essence, contend that the Tribe has to some extent been divested of this aspect of sovereignty. . . . The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331. . . . The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.

471 U.S. at 851-53. Even though federal law governed and conferred federal court jurisdiction, the Supreme Court required the parties in *National Farmers Union* to exhaust pending tribal court jurisdiction because of the "policy of supporting tribal self-government," the benefit to the federal court in "allowing a full record to be developed in the Tribal Court," and the advantages of

"encourag[ing] tribal courts to explain to the parties the precise basis for accepting jurisdiction." 471 U.S. at 856-57. These reasons to require exhaustion seem perfectly applicable to this case. The shoe fits, so we should wear it? Unfortunately, there are three problems that make this a far-from-obvious solution.

First is the fact that every case raising *Montana* exception issues came to the Supreme Court from lower federal courts, yet the Court never even considered exhaustion of tribal court remedies in cases like *South Dakota v. Bourland,* 113 S. Ct. 2309 (1993), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989), which were decided well after *National Farmers Union.* Perhaps the Supreme Court did not consider this question because no party raised it. On the other hand, perhaps the Court did consider *and reject* exhaustion for cases raising *Montana* exception issues, rather than tribal court jurisdiction issues. Though the question is hardly free from doubt, I think the first answer must be correct, particularly because the Court cited *Montana* in developing its exhaustion principles in *National Farmers Union.* Thus, I conclude that *National Farmers Union* exhaustion may properly be required in *Montana* exception cases.

Second is a problem that concerned the district court—if *Montana* exception issues require tribal court exhaustion, will the tribal court's answer be the last word? This question requires analysis of an often ignored but highly significant passage in *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 19 (1987):

> Although petitioner must exhaust available tribal remedies . . . . [if] the Tribal Appeals Court [rules] that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court. See *National Farmers Union, supra,* at 853. Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal

> court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts.

As the district court recognized, tribal court jurisdiction is not at issue here—the tribal court of course has jurisdiction to enforce a tribal tax or employment law. The federal question here goes to the merits of the case—whether the Tribe has the sovereign power to enact the tax and employment laws being enforced. If the preclusion referred to in *Iowa Mutual* is that which normally applies between federal and state courts, for example, the tribal court's decision on this question of federal law will be binding on the parties. *See Allen v. McCurry*, 449 U.S. 90, 103-04 (1980); *Montana v. United States*, 440 U.S. 147, 156 (1979). In that event, by requiring exhaustion, we will have surrendered authority to decide these critical *Montana* exception issues, a result at odds with the many Supreme Court decisions reserving these issues for the federal courts.

I believe that the key to unraveling this enigmatic passage in *Iowa Mutual* is to recall both the breadth of the discussion in *National Farmers Union*, which encompassed issues of tribal sovereignty as well as tribal court jurisdiction, and the nature of the merits of the case before the Court in *Iowa Mutual*, a diversity dispute over insurance coverage. With that in mind, I agree with the court that tribal court decisions concerning federal questions of tribal sovereignty may be challenged in the federal courts.

But I do not agree that, in deciding such challenges, we conduct some sort of direct review of the tribal court, considering issues of law de novo and findings of fact under the clearly erroneous standard. "Federal courts . . . . possess only that power authorized by Constitution and statute," *Kokkonen v. Guardian Life Ins. Co.*, No. 93-263, 1994 WL 183616, at *2 (U.S. May 16, 1994), and I know of no statute giving the district and

circuit courts jurisdiction to review tribal court decisions. *See* 28 U.S.C. §§ 1330-67 (district court jurisdiction), *and* §§ 1291-92 (court of appeals jurisdiction). The Supreme Court has ruled that we have federal question jurisdiction to decide *Montana* exception issues. The district court will ultimately decide those issues, with whatever guidance the tribal court may now provide. In my view, it is premature to determine what evidentiary or legal weight to ultimately give the tribal court's decision.

The third problem, and the most serious in my view, is that here there is no case pending in the tribal court, as there was in both *National Farmers Union* and *Iowa Mutual.* Requiring "exhaustion" in a forum not chosen by any party looks like a subversion of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976). Moreover, we do not know what form the dispute may take in tribal court, or whether the tribal court will even agree to review *Montana* exception issues that the federal court retains ultimate authority to decide.

On the other hand, the reasons for exhaustion cited in *National Farmers Union*—the policy of supporting tribal self-government, the advantages of allowing a full record to be developed in tribal court, and the benefit of receiving the tribal court's expertise on these issues of tribal sovereignty—apply whether or not the dispute is already pending in the tribal court. In these circumstances, I agree with the court that exhaustion is appropriate, but I also conclude that it would be an unwarranted abdication of the district court's jurisdiction to dismiss the case at this time. In my view, that court should grant a stay for a reasonable period to permit one or more of the parties to submit these disputes to the tribal court and to permit the tribal court to accept jurisdiction and rule. Following that, the district court should again take up the *Montana* exception issues, exercising

its discretion to give the tribal court's decision (if there is one) such deference as may be warranted.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
D. NORTH DAKOTA
NORTHWESTERN DIVISION

Civ. No. AI-91-222

DUNCAN ENERGY COMPANY, NBB OIL and GAS PARTNERS (USA), AMERADA HESS CORPORATION, TYREX OIL COMPANY and TURTLE MOUNTAIN GAS AND OIL, INC.,

Plaintiffs,

v.

THE THREE AFFILIATED TRIBES of the FORT BERTHOLD RESERVATION, THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL, THREE AFFILIATED TRIBES TAX COMMISSION, WILBUR D. WILKINSON, Chairman, Tribal Business Council, JOSEPH J. WALKER, Tax Commissioner, and MARCUS WELLS, JR., Director, Tribal Employment Rights Office,

Defendants.

Sept. 28, 1992

MEMORANDUM AND ORDER

CONMY, Chief Judge.

Glen Snowbird is to blame. If he had not been charged with assault in 1962 possibly the determination that the Northeast Quadrant was still within the exterior boundaries of the reservation might not have been made and the present dispute might not have arisen.

The Fort Berthold Reservation is a product of the swings of the congressional pendulum between separate

sovereignty status as opposed to the assimilation of the Indian nations. The reservation was established and was designed to be maintained intact in tribal ownership. In 1910 Congress apparently decided that the Indian peoples should be assimilated into the mainstream of society, and allowed for the purchase from the tribe by the federal government of almost one half of the acreage of the reservation and opened the land to homestead acquisition. At this time the Northeast Quadrant, the portion of the reservation opened to homesteading, is owned in fee by non-Indians almost entirely (97.5%).

For many years, the owners in the area assumed that the 1910 act and the sale and homesteading of the property removed the area from any form of tribal jurisdiction. Officials of the Bureau of Indian Affairs adopted this policy, and until Glen's arrest and challenge to the jurisdiction of the state and its subdivisions, the State of North Dakota acted as though the property was not part of the reservation. This court and the Eighth Circuit Court of Appeals found that the 1910 act did not take precedence over the treaty establishing the reservation, and that the exterior boundaries still included the Northeast Quadrant. *See The City of New Town, North Dakota v. United States,* 454 F.2d 121 (1972).

The Three Affiliated Tribes have recently taken actions leading to this and to other filings in this court, challenging the power of the tribal government. The actions are the passage of a taxation statute which would impose a severance tax upon all oil and gas production from lands within those exterior boundaries; the imposition of an ad valorem tax upon public utility structures such as transmission towers and telephone systems; and finally, a Native American preference statute which would require the giving of a preference in employment to Native Americans in any contracts requiring performance within the reservation.

In this action, plaintiffs seek a declaratory judgment invalidating the oil and gas extraction tax and the employment preference requirements insofar as they would be applicable to privately owned fee land (Indian and Non-Indian?) within the Northeast Quadrant. The court notes that other methods have existed by which former trust lands could end up being purchased, and sees no real distinction between fee lands wherever located upon the reservation if the analysis turns on what is required for minimum sovereignty.

Defendants urge that the case should be dismissed, based upon sovereign immunity, failure to exhaust tribal court remedies, and in a related vein, that as no assessments have been made, no justiciable controversy exists.

This court is firmly of the opinion that the world does not need another long analysis of the legal minefields of Tribal Court Jurisdiction and Tribal Government Sovereignty. It is the role of an appellate court to create scholarly works for future reference. The role of the trial court is to provide the vehicle for such displays of erudition—hopefully, for the benefit of the parties, an economy model vehicle.

The State of North Dakota and its political subdivisions now exercises ad valorem taxing authority over all lands held in fee whether within or without the exterior boundaries of the reservations as established by treaty. The test appears to be the issuance of a patent as the source of title.

Without re-citing the plethora of decisions ably argued in the briefs submitted, the current status of tribal sovereignty appears to be that tribal criminal jurisdiction is now restricted to tribal members. This is a power limitation tied to tribal "citizenship." Tribal civil jurisdiction is limited to that necessary to protect tribal self-government or to control internal relations, or

> [A] tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct affect on the political integrity, the economic security, or the health and welfare of the tribe.

Montana v. United States, 450 U.S. 544, 565-66, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493 (1981) (citations omitted).

Beauty is, of course, in the eye of the beholder, and the application of these principles to any specific fact pattern appears highly subjective. Both sides frequently cite the same case as standing for diametrically opposed positions.

After a review of the case law cited, the court is of the opinion that the Native American preference ordinance is valid only if limited to contracts wherein the tribe is a party or a guarantor.

In regard to the severance tax on minerals under patent fee land in the Northeast Quadrant, the court finds that it is not valid as it exceeds the necessary exercise of sovereignty by the tribe and further that taxation power over patented fee land in the Northeast Quadrant has been preempted by the grant to the state and its political subdivision of the power to impose an ad valorem tax.

The court also finds that the juristic entity identified as The Three Affiliated Tribes of the Fort Berthold Reservation has not consented to suit in the United States District Court, and under such name or as the business council or tax commission, is entitled to dismissal based on its governmental immunity. *Burlington Northern v. Blackfeet Tribe,* 924 F.2d 899, —— (9th Cir.1991).

cert. denied, —— U.S. ——, 112 S.Ct. 3013, 120 L.Ed.2d 887 (1992).

That immunity does not apply however to defendants Wilkinson, Walker and Wells. Tribal sovereign immunity does not extend to tribal officers allegedly acting in violation of federal law. *Id.* Their joinder in the action does provide a vehicle for judicial review of the challenged ordinances and threatened future assessments, and the motion to dismiss as to them is denied.

The court is well aware of the exhaustion rule set forth by the Supreme Court in *National Farmers Union v. Crow Tribe,* 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) and *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). In both cases, the Supreme Court required the defendants in a tribal court case to exhaust tribal court remedies before challenging the jurisdiction of the tribal court in federal court. The court reasoned that principles of comity require deference to the tribal court system. However, the court also noted in *LaPlante* that if the federal court determined that tribal courts properly assumed jurisdiction, the federal court could not review the merits of the underlying case. *LaPlante* at 19, 107 S.Ct. at 978.

The scope of this rule is by no means established. The Ninth Circuit Court of Appeals has pronounced the exhaustion doctrine to be "mandatory." *Burlington Northern R. Co. v. Crow Tribal Council,* 940 F.2d 1239, 1245 (9th Cir.1991). However, the ninth circuit has also found that there must be "an examination of the circumstances of the action before a decision to defer [to the tribal court] is made." *Stock West v. Taylor,* 942 F.2d 655, 661 (9th Cir.1991).

Similarly, the scope of the rule is unclear within the eighth circuit. In *United States ex rel. Kishell v. Turtle Mountain Housing Authority,* 816 F.2d 1273 (8th Cir. 1987) and *Weeks Construction, Inc. v. Oglala Sioux*

Housing Authority, 797 F.2d 668 (8th Cir.1986), the Eighth Circuit Court of Appeals required the plaintiffs to exhaust the available tribal remedies before bringing a federal action. Although in both cases there was no pending tribal action, both cases involved internal tribal disputes. In *Kishell*, the Eighth Circuit stated that the "facts tend to demonstrate that this is a purely internal tribal controversy, which the tribal court is uniquely situated to resolve." *Kishell* at 1276 (citing *Weeks*).

In *Myrick v. Devils Lake Sioux MFG. Corp*, 718 F.Supp. 753 (D.N.D.1989), the court distinguished its case from *Kishell* and *Weeks*, noting that there was no challenge to the jurisdiction of the tribal court and the tribe was not a party. *Id.* at 755. The district court denied a motion to dismiss under the exhaustion doctrine, finding that the federal claims were properly heard in federal court. *Id.*

This court is not willing to accept the premise that only the tribal court has the power to determine the extent of the power of the tribal government under the facts of this case. Unlike *National Farmers Union* and *LaPlante*, this is not a case where tribal jurisdiction is challenged, but a case where the power of the tribe to excise a severance tax is challenged. This is not a case involving a "purely internal tribal controversy." Requiring the exhaustion of tribal remedies would not advance tribal self-government and tribal self-determination. Therefore, the court will not require the exhaustion of tribal remedies.

The motion to consolidate is also denied. The court hopes to provide an economical appeal route through the instant case through final judgment therein. Joinder would compound the issues and costs.

The court notes that both parties have extensively briefed as though in support of or in opposition to a

motion for summary judgment. No such motion has been made, although the court would welcome such a filing.

Based on the foregoing, it is the order of the court:

1. The motion to consolidate is DENIED.. (doc. # 19)
2. The motion to dismiss is partially GRANTED as to the tribe, the tax commission, and the business council and DENIED as to the individual defendants. (doc. # 5, 19)
3. The motions for extension of time and for leave to file a reply brief are DENIED as moot. (docs. # 13, 14, 15)

SO ORDERED.

[Filed Sept. 22, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A1-91-228

DUNCAN ENERGY COMPANY, NBB OIL and GAS PARTNERS, (U.S.A.), AMERADA HESS CORPORATION, TYREX OIL COMPANY and TURTLE MOUNTAIN GAS AND OIL, INC.,

Plaintiffs,

vs.

THE THREE AFFILIATED TRIBES of the FORT BERTHOLD RESERVATION; THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL; THREE AFFILIATED TRIBES TAX COMMISSION; WILBUR D. WILKINSON, Chairman, Tribal Business Council, JOSEPH J. WALKER, Tax Commissioner, and MARCUS WELLS, JR., Director, Tribal Employment Rights Office,

Defendants.

MEMORANDUM AND ORDER

Plaintiffs have moved for summary judgement. The following facts appear to be undisputed.

1. The plaintiffs are engaged in oil and gas exploration and production from existing wells located "within the exterior boundaries" of the Fort Berthold Indian Reservation.

2. The Fort Berthold Indian Reservation was created by act of Congress March 3, 1891 (26 Stat. 1032).

3. On June 1, 1910, (36 Stat. 455) Congress authorized the homesteading of "surplus lands" and the payment by

the government to the Tribes as compensation for the lands opened to homesteading.

4. As a result of the 1910 Act and the act of August 3, 1914 (38 Stat. 681), the area of the reservation referred to as the "Northeast Quadrant" was opened to homestead settlement.

5. From this time until the 1970s, the federal government treated the "Northeast Quadrant" as though it was no longer part of the reservation, a treatment similar to that accorded Rosebud and Pine Ridge Reservation "excess lands" in the State of South Dakota.

6. Congress then authorized the construction of a series of dams and reservoirs on the Missouri River—the Pick-Sloan project. As a result of the construction of the Garrison Dam, the riverbottom lands occupied by 87% (my sources—90% defendant's source) of the Indian inhabitants of the Fort Berthold Reservation were flooded, forcing their relocation into new communities and disrupting the traditional life style. Completely innundated were the communities of Spanish, Elbowoods and Van Hook.

7. Tribal Government was primarly relocated to "New Town", which was just that, a replacement community—a new town, which rather ironically is located within the so called "Northeast Quadrant".

8. In 1972, in a challenge to Indian and Federal jurisdiction over an assault occurring in New Town, the circuit ruled that the 1910 act, despite opening the area to non-indian homestead and purchase, did not operate to shrink the borders of the reservation established in 1892. This result was directly contrary to that reached in the South Dakota cases, which construed different statutes, but the differences are, to be charitable, "small".

9. At this time, the so called "Northeast Quadrant" consists of the following:

a.	345,894 acres "Non-Indian fee land"	97.73%
b.	2,509 acres "Indian owned fee land"	.71%
c.	5,513 acres "Indian Trust land"	1.56%
	363,917 acres	100%

10. Plaintiffs operate oil and gas wells on land owned in fee by non indian owners, and do so under mineral rights or leases from non-indian mineral owners.

11. In 1988 the constitution of the Three Affiliated Tribes was amended to provide that the jurisdiction of the tribal government shall extend to all persons and all lands, including lands held in fee, located within the exterior boundaries of the reservation.

12. The Tribal Government adopted a Tribal Employment Rights Ordinance, requiring the giving of preference in employment to tribal members in all employment contracts within the boundaries of the reservation, and in addition, an oil and gas production tax and a possessory interest tax.

13. Plaintiffs challenge the authority of the Three Affiliated Tribes to enforce the ordinance and taxes as to them.

14. Chronic unemployment and under employment are very great social problems on the Reservation, and revenues derived from any form of taxation would be very helpful to tribal government in providing for the "Safety, Health and Welfare" of the tribal members.

Adopting the position that the 1910 and 1914 acts removed this area from the reservation would solve all the issues presented. The ink is hardly dry however on the decision in United States of America v. Neil D. Standish, filed September 7, 1993, wherein the 8th Circuit disposes of this argument in short order—"Although we held Congress intended to diminish the Pine Ridge and Rosebud Reservations by opening them to homesteading, we distinguished the acts relating to those reservations from the Fort Berthold Act, in which we found

Congress had no intention to diminish the Fort Berthold Reservation." The court notes that an appeal of a conviction for a brutal murder is not a particularly sympathetic vehicle for a re-examination of this issue.

With this avenue of possible escape well barricaded if not completely closed, the Court is forced into the snare-laden jungle of tribal government jurisdiction. Recent decisions have not been favorable to any extensions of the powers of tribal governments.

The court has analyzed the following decisions: Montana v. United States, 450 U.S. 544 (1981), Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), Duro v. Reina, 110 S. Ct. 2053 (1990), Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 109 S. Ct. 2994 (1989), County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992), and from that analysis has concluded that the ordinance and tax statute in question here cannot meet the standards set down by the United States Supreme Court.

Tribal governments clearly have the authority to regulate commercial transactions between the tribe or its members and non members of the tribe. That regulation may be through the imposition of conditions of lease or use of tribal property, such as mineral leases, or employment requirements for industries partially owned or financed through tribal government, or operating in any contractual relationship with the Tribe.

The second part of the Montana test is more subjective, and perhaps illustrated best by Brendale. Certain powers must be present for tribal sovereignty to have any meaning or effect. The exercise of such power is a requirement for sovereignty. The exercise of such power is necessary to protect the health, safety and welfare of the "citizens" of the tribe.

The Montana court found no clear relationship to tribal self government in the attempted imposition of

hunting and fishing regulations on fee lands owned by non-members within the reservation boundaries.

The Merrion court had no trouble affirming the regulation of oil and gas production by the tribe, where the production was from mineral rights leased by the tribe to the operators. This is the consensual commercial relationship basis.

In Duro the court limited tribal court criminal jurisdiction to tribal members, which virtually destroys any effective criminal law enforcement by tribal governments. The previous racial test, Indian v. Non-indian, was equally distasteful, but it covered more possible offenders and gave the court more power for the solving of local problems. The requirement for "citizenship" in order to be held accountable for a criminal act in tribal court is a severe limitation upon sovereign authority.

In Brendale the court determined that the exercise of zoning power over fee land, under the factual pattern presented, was not an essential exercise of sovereign power.

In County of Yakima the Court affirmed the power of the county government to impose an ad valorem tax against lands which had been removed from "trust status" —fee lands, *even when such fee lands were owned by the Tribal Government itself.*

"Dear Tribal Counsel:

This is to advise you that the Tribal Government building will be sold for back taxes at the Yakima County Courthouse unless payment is received immediately."

Signed: Auditor, Yakima County, Washington

With the background of these recent decisions, the employment ordinance and tax statutes involved here cannot be found to be valid exercises of tribal sovereignty as to fee lands, particularly in the Northeast Quadrant. These plaintiffs have no commercial consensual arrangements

or contracts with the Tribe. They are dealing with private land owners, either surface or mineral, who are subject to county ad valorem taxation on the fee lands and State extraction and severance taxes on the gas and oil production. The entire area is a virtually solid area of private ownership, 97.73% non-indian.

There is no doubt that tax revenue would be helpful in tribal government efforts to improve conditions on the reservation. No doubt George III had some worthy projects in mind in the 1770s, but taxation without representation was not popular with the colonists then and still doesn't seem terribly just.

There is also no doubt that the Indian peoples have not been treated fairly by the Congress. Large areas were contemplated when it was thought that no one else wanted them. Treaties required consent by a majority of the tribe members for certain changes. Those requirements were ignored or circumvented by creative counting, and when it became economically advantageous to take the land back, Congress did so. Non-indians protested the Garrison Dam land condemnation plan so long as it contemplated giving acreage in replacement for the acreage to be flooded. As soon as the plan was changed to give money in exchange for land, rather than land for land, the opposition vanished and opponents began gearing up to get the money back also in commercial transactions with the tribal members.

It is equally without doubt that the location of an "exterior boundary" on a map is pretty meaningless in the assessment of tribal government authority. Using the tests adopted by the United States Supreme Court, homesteading and fee status have resulted in a de facto exclusion of the Northeast Quadrant from most aspects of tribal jurisdiction.

Plaintiffs are entitled to judgment declaring that the purported employment and taxation enactment are invalid as applied to fee lands and private contracts. As the com-

plaint limits the relief requested to the "Northeast quadrant" and as other fee lands might present a distinctly different fact situation, the judgment is also limited to the Northeast quadrant.

SO ORDERED

Dated this 22nd day of September, 1993.

/s/ Patrick A. Conmy
PATRICK A. CONMY
District Judge
United States District Court

[Entered Sept. 22, 1993]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3622 NDBI

DUNCAN ENERGY COMPANY, *et al*,
Appellees,

vs.

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,
Appellants.

ORDER DENYING PETITION FOR
REHEARING AND SUGGESTION
FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Judge Bowman and Judge Magill would grant the suggestion.

The petition for rehearing by the panel is also denied.

July 19, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gens
MICHAEL E. GENS
Clerk
U.S. Court of Appeals
Eighth Circuit

[Filed Sept. 29, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A1-91-222

DUNCAN ENERGY COMPANY, NBB OIL and GAS PARTNERS, (U.S.A.), AMERADA HESS CORPORATION, TYREX OIL COMPANY and TURTLE MOUNTAIN GAS AND OIL, INC.,

Plaintiffs,

vs.

THE THREE AFFILIATED TRIBES of the FORT BERTHOLD RESERVATION; THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL; THREE AFFILIATED TRIBES TAX COMMISSION; WILBUR D. WILKINSON, Chairman, Tribal Business Council, JOSEPH J. WALKER, Tax Commissioner, and MARCUS WELLS, JR., Director, Tribal Employment Rights Office,

Defendants.

JUDGMENT IN A CIVIL CASE

Pursuant to the Memorandum and Order entered by the Court on September 22, 1993, it is ADJUDGED, DECREED AND DECLARED as follows:

1. That as a result of the 1910 Act (36 Stat. 455), and acts supplemental thereto, an area of the Fort Berthold Reservation referred to as the "Northeast Quadrant" was opened to homestead settlement. That such homesteading and consequent fee status of virtually all the lands in the Northeast Quadrant have resulted in a de facto exclusion of such lands from tribal sovereign power to impose and enforce the tribal Oil and Gas

Gross Production Tax and Possessory Interest Tax (Chapters 7 and 8 of Tribal Tax Code dated December 1990 as amended) and the Tribal Employment Ordinance (TERO).

2. That said TERO ordinance and tax statutes cannot meet the standards set down by the United States Supreme Court in *Montana v. United States,* 450 U.S. 544 (1981), *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982), *Duro v. Reina,* 110 S.Ct. 2053 (1990), *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation,* 492 U.S. 408, 109 S.Ct. 2994 (1989), and *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 112 S.Ct. 683 (1992).

3. That the juristic entity identified as The Three Affiliated Tribes of the Fort Berthold Reservation has not consented to suit in the United States District Court, and under such name or as the business Council or Tax Commission, is dismissed based upon governmental immunity.

4. That such sovereign immunity does not extend to the defendants Wilkinson, Walker and Wells, as tribal officers acting in violation of federal law.

5. That the defendant tribal officers, including any successors in office, lack the sovereign power and authority to impose the aforementioned employment and tax statutes against plaintiffs' activities and property interests on fee lands within the Northeast Quadrant, and that said enactments are hereby declared to be invalid as applied to fee lands and private contracts within the Northeast Quadrant.

6. The application of hereforementioned tribal tax statutes and employment ordinances are in violation of plaintiffs' constitutional rights as they amount to taxation and regulation without consent or representation.

7. That the tribal officer defendants, including any successors in office, are hereby enjoined and restrained from interfering in any manner with the activities and operations of the plaintiffs on fee lands in the Northeast Quadrant, and are further enjoined and restrained from imposing or enforcing said Tribal Employment Rights Ordinance, Oil and Gas Production Tax and Possessory Interest Tax of the Three Affiliated Tribes of the Fort Berthold Reservation against plaintiffs and their property.

8. That the tribal officer defendants, including any successors in office, are further enjoined and restrained from imposing any other taxes or enforcing any regulatory authority over the plaintiffs' activities and property within the Northeast Quadrant.

Dated this 29th day of September, 1993.

EDWARD J. KLECKER
Clerk

By: /s/ Deborah Thomason
DEBORAH THOMASON
Deputy

[Entered Sept. 29, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A1-91-222

DUNCAN ENERGY COMPANY, NBB OIL & GAS PARTNERS (U.S.A.), AMERADA HESS CORPORATION, TYREX OIL COMPANY and TURTLE MOUNTAIN GAS & OIL, INC.,
Plaintiffs,

vs.

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION; THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL; THREE AFFILIATED TRIBES TAX COMMISSION, WILBUR D. WILKINSON, Chairman, Tribal Business Council; JOSEPH J. WALKER, Tax Commissioner; and MARCUS WELLS, JR., Director, Tribal Employment Rights Office.
Defendants.

AFFIDAVIT OF JOHN V. CESTIA

STATE OF COLORADO)
) §
COUNTY OF DENVER)

The undersigned, being of lawful age and being first duly sworn under oath, deposes and states as follows:

1. That I am employed as a senior landman with Duncan Energy Company. That I have been employed as a landman with Duncan Energy Company since July 16, 1984.

2. That one of my duties as senior landman is to oversee the acquisition of oil and gas drilling prospects in the State of North Dakota.

3. That NBB Oil & Gas Partners (U.S.A.) (hereinafter "NBB") is an oil and gas partnership which is operated by Duncan Energy Company as managing partner.

4. That NBB has acquired oil and gas leases on fee lands within the Northeast Quadrant of the Fort Berthold Indian Reservation covering approximately 12,543 net acres of land. That the acquisition costs for these oil and gas leases was approximately $188,145.00.

5. That Duncan Energy Company occasionally operates (i.e., drills) oil and gas wells.

6. That Duncan Energy Company, as operator, and/or NBB, as a leasehold owner, have participated in the drilling of approximately 25 oil and gas wells on fee lands within the Northeast Quadrant of the Fort Berthold Indian Reservation in oil and gas fields known as Wabek, Centennial and Lucky Mound. That Duncan Energy Company and/or NBB have expended approximately $10,065,000 in the drilling and completion of said oil and gas wells.

7. That NBB, as a leasehold owner in the wells, is subject to the oil and gas extraction and severance taxes as levied by the State of North Dakota.

Dated this 18th day of June, 1993.

/s/ John V. Cestia
JOHN V. CESTIA

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A1-91-222

DUNCAN ENERGY COMPANY, NBB OIL & GAS PARTNERS (U.S.A.), AMERADA HESS CORPORATION, TYREX OIL COMPANY and TURTLE MOUNTAIN GAS & OIL, INC.,
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3. That NBB Oil & Gas Partners (U.S.A.) (hereinafter "NBB") is an oil and gas partnership which is operated by Duncan Energy Company as managing partner.

4. That Duncan Energy Company, as operator, and/or NBB, as a leasehold owner, have participated in the drilling of approximately 25 oil and gas wells on fee lands within the Northeast Quadrant of the Fort Berthold Indian Reservation in oil and gas fields known as Wabek, Plaza, and Lucky Mound.

5. That attached hereto as Exhibit A is an oil and gas production report prepared by the North Dakota State Industrial Commission, Oil and Gas Division, identifying the wells operated by Duncan Energy Company in these three oil and gas fields.

6. That in no manner are the activities of Duncan Energy Company as operator of these oil and gas wells regulated by the Three Affiliated Tribes of the Fort Berthold Reservation. That all aspects of Duncan Energy Company's operations, such as permitting, drilling and completing, conservation practices, sealing off freshwater strata, well abandonment and reclamation of well sites are regulated by the State Oil and Gas Division.

7. That Duncan Energy Company, in its status as operator of these oil and gas wells on fee lands, has not utilized any governmental services purportedly offered by the Three Affiliated Tribes.

Dated this 24th day of August, 1993.

/s/ John V. Cestia
JOHN V. CESTIA

Supreme Court, U.S.
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No. 94-689

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DUNCAN ENERGY COMPANY, NBB OIL & GAS PARTNERS (U.S.A.), AMERADA HESS CORPORATION, TYREX OIL COMPANY AND TURTLE MOUNTAIN GAS & OIL, INC.,
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THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION; THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL; THREE AFFILIATED TRIBES TAX COMMISSION; WILBUR D. WILKINSON, CHAIRMAN, TRIBAL BUSINESS COUNCIL; JOSEPH J. WALKER, TAX COMMISSIONER; AND MARCUS WELLS, JR., DIRECTOR, TRIBAL EMPLOYMENT RIGHTS OFFICE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MEMORANDUM OPPOSING CERTIORARI

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OCTOBER TERM, 1994

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THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MEMORANDUM OPPOSING CERTIORARI

Petitioners ("Oil Companies") brought this action against respondent Three Affiliated Tribes of the Fort Berthold Reservation and agencies and officers thereof ("Tribe") challenging tribal tax and employment ordinances applicable to their activities on lands owned by non-Indians in fee ("fee lands") within the Tribe's reservation. The Eighth Circuit Court of Appeals held that *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), required the Oil Companies to exhaust tribal remedies before bringing suit in federal court, and ordered the case dismissed without prejudice or stayed pending the exhaustion of tribal remedies. Pet. App. 10a-13a. Earlier this term the Court denied certiorari in a case involving substantially the same issues. *Middlemist v. Babbit*, No. 94-42, 63 U.S.L.W. 3346 (U.S. Oct. 31, 1994). *See* Pet. at 10-11, noting similarity to *Middlemist*. Petitioners in *Middlemist*, like petitioners

here, were non-Indians who sued tribal agencies and officials challenging the Tribe's assertion of regulatory jurisdiction over their activities on fee lands within the reservation. The Ninth Circuit in *Middlemist* affirmed the dismissal of the case without prejudice for failure to exhaust tribal remedies, relying on *Iowa Mutual* and *National Farmers Union*. *Middlemist v. Babbit*, 19 F.3d 1318 (9th Cir. 1994), *aff'g* 824 F.Supp. 940, 944 (D.Mont. 1993).

1. The first question presented in this case—whether exhaustion of tribal remedies is required in the absence of ongoing tribal proceedings—is the same as the first question presented in *Middlemist*. *See* Petition for Writ of Certiorari, *Middlemist* at i, No. 94-42 ("*Middlemist* Pet."). As shown in the Brief for the Federal Respondents in Opposition in *Middlemist* ("U.S. *Middlemist* Br.") (at 6-10), there is no conflict between the circuits on this issue, and requiring exhaustion in the absence of ongoing tribal proceedings is fully consistent with this Court's precedents, including *Iowa Mutual* and *National Farmers Union*, cited above.

2.a. The second question presented by petitioners here appears to encompass two separate but related questions: (1) whether exhaustion of tribal remedies is required where the non-Indian conduct regulated by the tribe occurs on fee lands and the tribe asserts that "that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *Montana v. United States*, 450 U.S. 544, 566 (1981) (the so-called "second *Montana* exception"), and (2) "in the face of Congressional abrogation of tribal sovereign power, can a tribe possess civil regulatory jurisdiction over non-member activity" on fee lands. These questions were also encompassed in the second issue presented in the petition which was denied in *Middlemist*, *see Middlemist* Pet. at i, as acknowledged by the Oil Companies. Pet. at 10-11. There is no conflict of the circuits on these issues, and requiring exhaustion in a

Montana exceptions case and applying the second *Montana* exception to fee lands within a reservation are fully consistent with this Court's precedents, including *Iowa Mutual* and *National Farmers Union*. (U.S. *Middlemist* Br. at 10-12).

b. Moreover, it would be premature for the Court to consider in this case whether "in the face of Congressional abrogation of tribal sovereign power," the Tribe may regulate the activities at issue here on the fee lands involved. The question assumes abrogation of the Tribe's powers over the lands involved, an issue which the Eighth Circuit did not decide, since it held (1) that that decision would turn on the specific facts of the case to be developed in the future, and the district court had erred in finding the tribal ordinance to be impermissible as a matter of law, Pet. App. 8a-9a, and (2) that tribal remedies must be exhausted as to this issue, Pet. App. 13a. The Oil Companies may make this argument to the tribal court, whose decision may then be reviewed by the federal district and circuit courts, after which the Oil Companies may petition this Court for writ of certiorari. To the extent the Oil Companies argue that the Tribe cannot rely on the second *Montana* exception as a matter of law, that issue may not even need to be decided in this case since the Tribe may not meet the "heavy burden [of] justifying these tax and employment statutes under the *Montana* exceptions," Pet. App. 13a, and judgment could ultimately be rendered for the Oil Companies on those grounds.

Respectfully submitted,

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November 28, 1994

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October Term, 1994

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v.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION OF ROCKY MOUNTAIN OIL & GAS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION OF ROCKY MOUNTAIN OIL & GAS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Rocky Mountain Oil & Gas Association ("**RMOGA**"), pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, submits this Motion

for Leave to File Brief Amicus Curiae requesting the Court to allow RMOGA to file its Brief of Amicus Curiae in Support of Petition for Writ of Certiorari filed on behalf of the Petitioners Duncan Energy Company, NBB Oil & Gas Partners (U.S.A.), Amerada Hess Corporation, Tyrex Oil Company and Turtle Mountain Gas & Oil, Inc. on October 17, 1994.

RMOGA is a voluntary, non-profit trade organization designed to promote the discovery, development, production, transportation, refining, conservation, and marketing of oil and gas in eight states within the Rocky Mountain region, including the state of North Dakota. RMOGA's members own, lease, or operate significant oil and gas properties in, on, and surrounding many major Indian reservations within those states. Indeed, RMOGA members account for more than 90% of the oil and gas activities within its constituent states, including, but not limited to, activities on the Navajo, Uintah and Ouray, Southern Ute, Blackfeet, Crow, Rocky Boy's, Flathead, Fort Belknap, Fort Peck, Wind River, and Fort Berthold Reservations. Because the activities of RMOGA members constitute the major portion of oil and gas operations on the reservations, including operations on federal, state, and private enclaves within the exterior boundaries of those reservations, RMOGA is directly affected by the Eighth Circuit's decision. RMOGA can provide the Court with a macro-view of the effect of the decision below on oil and gas operations in the Rocky Mountain region, the frustrations arising from conflicting circuit decisions, and other relevant economic and demographic information bearing on the issue of attempted tribal regulation of public and private enclaves within their reservations that

has not already been brought to the Court's attention by the parties. For this reason, RMOGA respectfully requests this Court to grant its Motion for Leave to File Brief Amicus Curiae and to consider the Brief of Amicus Curiae in Support of Petition for Writ of Certiorari filed on behalf of the Petitioners.

Counsel for RMOGA has obtained a letter of consent from counsel for the Petitioners. A copy of the consent letter is submitted herewith under separate cover. Counsel for RMOGA requested consent from counsel for the Respondents. Respondents denied RMOGA's request.

Respectfully Submitted,

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November 28, 1994

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amicus Curiae the Rocky Mountain Oil & Gas Association ("**RMOGA**"), pursuant to Rule 37 of the Rules of the Supreme Court of the United States, submits this Brief

of Amicus Curiae in Support of Petition for Writ of Certiorari filed on behalf of Petitioners Duncan Energy Company, NBB Oil & Gas Partners, Amerada Hess Corporation, Tyrex Oil Company and Turtle Mountain Gas & Oil, Inc. on October 17, 1994, and respectfully requests, pursuant to 28 U.S.C. § 2101(c), that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the Order entered by the Eighth Circuit on June 8, 1994, as confirmed by denial of rehearing en banc July 19, 1994.

INTEREST OF AMICUS CURIAE

RMOGA is an industry trade organization whose members own, lease, or operate oil and gas properties in the Rocky Mountain region. It is a voluntary, non-profit association designed to promote the discovery, development, production, transportation, refining, conservation, and marketing of oil and gas in the states of Colorado, Idaho, Montana, Nebraska, North and South Dakota, Utah and Wyoming and to foster the best interests of the public and the industry.

RMOGA members constitute major, as well as independent, oil companies. They account for 90% of the oil and gas activity in the eight constituent states, including activity in, on, and surrounding the numerous Indian reservations in these states. The reservations include the most geographically expansive Indian reservations in the

continental United States,[1] as well as the majority of reservations of energy producing tribes.[2] Many of their oil and gas properties comprise enclaves of federal, state, or private ("fee") lands owned by non-Indians within the

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[1] Acreage in tribal and allotted reservation lands within RMOGA's constituent states equals 7,920,812 acres as of 1977. *See* PETER C. MAXFIELD, ET AL., NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS App. C, at 321-35 (1977) (hereinafter MAXFIELD). Recent decisions of the federal judiciary have expanded the acreage total to exceed 10,000,000 acres. *See, e.g., Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072 (D. Utah 1981), *aff'd*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 478 U.S. 1002 (1986) (expanding the Uintah & Ouray Reservation by 3,000,000 acres), and *Hagen v. Utah*, ___ U.S. ___, 114 S.Ct. 958, *reh'g denied*, ___ U.S. ___, 114 S.Ct. 1580 (1994) (diminishing the expanded Uintah & Ouray Reservation by approximately 1,000,000 acres).

[2] Reservations within the constituent RMOGA states (and tribes if different from reservation names) include the following: **Colorado** – Southern Ute, Ute Mountain Ute; **Idaho** – Fort Hall (Shoshone – Bannock), Coeur D'Alene (Coeur d'Alene – Kootenai – Pend d'Oreille – Spokane), Kalispel, Kootenai, Lapwai (Nez Perce); **Montana** – Blackfeet (Blackfeet – Blood – Piegan), Crow, Flathead (Flathead – Kootenai – Kalispel – Pend d'Oreille – Bitter Root – Carlos Band), Fort Belknap (Assiniboin – Gros Ventre), Rocky Boy's (Chippewa Cree), Fort Peck (Assiniboin – Sioux), Tongue River (Northern Cheyenne); **Nebraska** – Omaha, Ponca, Santee-Sioux, Winnebago; **North Dakota** – Fort Berthold (Arikara – Hidatsa – Mandan: The Three Affiliated Tribes), Fort Totten (Sioux), Standing Rock (Sioux), Turtle Mountain (Chippewa); **South Dakota** – Cheyenne River (Sioux), Crow Creek (Sioux), Flandreau-Santee Sioux, Lower Brule Sioux, Pine Ridge (Ogalala Sioux), Rosebud (Sioux), Yankton (Sioux), Sisseton-Wahpeton (Sioux), Standing Rock (Sioux); **Utah** – Navajo, Uintah & Ouray (Northern Ute); and **Wyoming** – Wind River (Shoshone – Arapaho). *See* MAXFIELD, *supra* note 1, at Apps. B & D, pages 306-20, 337-59.

exterior boundaries of Indian reservations, including the Fort Berthold Reservation.

RMOGA has a substantial interest in the outcome of this case for six primary reasons. First, its members have become increasingly subject to attempts by Indian tribes to regulate oil and gas operations on fee and public lands within reservation boundaries. In view of these continuing attempts, access to federal court for injunctive and declaratory relief is imperative. The Eighth Circuit's holding in this case prohibits any consideration by a federal court of the appropriateness of tribal regulation and governance until the tribal court has ruled on the scope of tribal jurisdiction. The Eighth Circuit's holding makes the exhaustion (abstention) doctrine absolute, regardless of whether a federal question is involved or the lands regulated are tribal, public or private. It, in effect, establishes a double standard for access. It forecloses federal court relief in the first instance to non-Indians, but leaves unfettered the right of Indian tribes to choose between the federal and tribal forums.

Second, absolute application of the exhaustion doctrine will have a chilling effect on the exploration for, and the development and production of, natural resources vital to the economy and national defense of the United States. The rising costs of oil and gas exploration, development, and production simply will not sustain the added expense of multi-jurisdiction regulation of the same oil and gas operations and lands.[3] It is one thing for

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[3] On some reservations, such as the Navajo and Uintah & Ouray in Utah, federal, Indian, and state agencies assert

tribal governments to choose as a matter of principle, philosophy, or agenda to temporarily or permanently forego energy development of their own lands and to postpone the enhancement of tribal treasuries by the attendant revenue stream comprising mineral royalty and tribal severance, use, and business activities tax dollars. However, it is quite another to interfere by way of regulation and asserted jurisdiction with private and public

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concurrent operational jurisdiction over oil and gas exploration, development, and production. *See, e.g.*, Pub. L. No. 85-868, 72 Stat. 1686 (1958) & Pub. Land Order 3397, 29 *Fed. Reg.* 6685-86 (1964) (creating the 51,606.78-acre McCracken Mesa enclave of federal (public domain) mineral estate underlying tribal surface estate within the expanded Navajo Nation, which federal mineral estate is administered by the Bureau of Land Management under the Mineral Leasing Act of 1920, and which tribal surface estate is administered by the Bureau of Indian Affairs and the Navajo Nation); Pub. L. No. 80-440, 62 Stat. 72 (1948) (creating the Hill Creek Extension of the Uintah & Ouray Reservation, establishing a 726,000-acre enclave of federal (public domain) mineral estate overlain by tribal surface estate) [*see* FRED A. CONETAH, A HISTORY OF THE NORTHERN UTE PEOPLE 140-142 (Kathryn L. MacKay & Floyd A. O'Neil eds., 1982)]; *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072 (D. Utah 1981), *aff'd*, 773 F.2d 1987 (10th Cir. 1985), *cert. denied*, 478 U.S. 1002 (1986) (restoring the original boundaries of the Uintah Valley and Uncompahgre Reservations [now the Uintah & Ouray Reservation] containing numerous inholdings of private, state, and federal lands, particularly within the Uncompahgre portion of the reservation not affected by *Hagen v. Utah*, ___ U.S. ___, 114 S.Ct. 958, *reh'g denied*, ___ U.S. ___, 114 S.Ct. 1580 (1994); and Utah Code Ann. § 40-6-18 (1993) (asserting oil, gas, and mining operational jurisdiction over private, federal, and tribal lands within the State of Utah).

rights to explore for and produce oil and gas from federal, state, and fee enclaves locked within those reservations or to risk impairment of the nation's economy and security which surely will result from loss of production from those enclaves. Adding layers of governmental regulation and requiring submission to mulitiple sovereign courts increases costs. At some point, companies will find the costs of operating on or within the boundaries of Indian reservations prohibitive.

Third, the law of the circuit and district courts is in disarray, construing *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) variously. The result of these conflicting opinions is that RMOGA's members are subjected to varied procedural processes for resolving the same substantive issues. This Court needs to clarify the law.

Fourth, the majority of circuit courts have projected the law of *National Farmers* and *Iowa Mutual* far beyond what RMOGA believes was this Court's intent. *National Farmers* and *Iowa Mutual* carved-out a mere exception to federal jurisdiction under those limited circumstances when an adjudicatory proceeding is already pending in tribal court. Those cases never made absolute and universal what this Court intended to be a mere exception to federal court jurisdiction.

Fifth, RMOGA is concerned that its members, in an effort to protect their property rights on federal, state, and fee enclaves within Indian reservations, will find themselves subject to tribal jurisprudence whose statutory and common law underpinnings, particularly of

property ownership, vary widely from the Anglo-American jurisprudence under which RMOGA members acquired and hold their property rights. The problem is not one of moral or ethical superiority of one body of law over the other. Rather, it is the incongruous result of rights acquired under one concept of law, with its attendant expectations of use and enjoyment, being rendered subject to a wholly different body of law in practical enjoyment and exercise of those rights.

Sixth, RMOGA is uniquely positioned and qualified to provide the Court with a global view of the effect of the Eight Circuit's decision on oil and gas exploration, production, and transportation activities in Indian Country. RMOGA members regularly contend with the application and misapplication of the exhaustion doctrine on the numerous reservations identified. It possesses a reservoir of legal expertise gathered in addressing the issues of tribal sovereignty and interference with, and protection of, property rights stemming from non-Indian inholdings within the reservations, as well as litigating federal questions arising from its activities on the reservations. It has gathered and compiled economic and demographic data regarding the effect of multi-sovereign regulation and taxation of production from lands in, on, and surrounding Indian reservations that will be useful to the Court.

SUMMARY OF THE ARGUMENT

This case warrants review by this Court to resolve important issues regarding the relationship between federal and tribal courts. In particular, review of this case is necessary to resolve the various conflicts among the circuit courts as to the application of the exhaustion rule set forth in *National Farmers* and *Iowa Mutual*. Although *National Farmers* and *Iowa Mutual* involved efforts to avoid pending tribal court proceedings by commencing challenges to tribal court jurisdiction in federal court, the four circuit courts to have considered exhaustion have inconsistently applied the rule. Each of the four circuit courts have applied the exhaustion rule to cases not simply involving jurisdictional challenges, but rather to cases which, on their merits, involve determinations of federal law. Although cases within each circuit differ, the Eighth, Ninth and Tenth Circuits, *at times*, have required mandatory abstention in cases having an Indian reservation nexus. The Seventh Circuit, however, rejected mandatory abstention in favor of a particularized review. Review by this Court is necessary to determine the proper scope and application of the exhaustion rule.

Furthermore, a mandatory exhaustion rule, as adopted by the Eighth Circuit below, runs contrary to this Court's prior decisions. Requiring federal courts to abstain from cases having an Indian reservation nexus runs counter to the well-established case law requiring federal courts to exercise the jurisdiction granted to them by Congress. A mandatory exhaustion rule also conflicts with other precedent, not requiring abstention, where the authority of a tribe to regulate the activities of nonmembers is at issue.

Finally, in light of this Court's holding in *Iowa Mutual* that federal courts may not re-litigate issues decided by a tribal court, a mandatory exhaustion rule will, in effect, make tribal courts the final arbiter of federal law in every case having an Indian reservation nexus. This result runs counter to existing precedent under which federal courts determine the scope of a tribe's sovereign authority.

ARGUMENT

I. THE CIRCUIT COURTS ARE IN CONFLICT IN APPLYING THE EXHAUSTION RULE SET FORTH IN *NATIONAL FARMERS AND IOWA MUTUAL.*

In *National Farmers* and *Iowa Mutual*, this Court set forth an exhaustion rule preventing collateral attack in federal court of tribal court jurisdiction when there is a *pending* tribal court proceeding. The circuit courts have, however, inconsistently applied the exhaustion rule as set forth by *National Farmers* and *Iowa Mutual*. Not only are the circuit court decisions inconsistent, but decisions within the same circuit court have conflicted with each other.

In *National Farmers*, this Court faced a challenge to the jurisdiction of a tribal court. There, a Crow Indian filed suit in tribal court against a school district for personal injuries arising from an accident at a school located within the reservation but on land owned by the state of Montana. Upon the failure of the school district to respond, the plaintiff took a default judgment in the tribal court. Thereafter, the school district and its insurer filed suit in federal court, challenging the jurisdiction of the

tribal court and requesting an injunction against further proceedings in tribal court. The school district and its insurer relied on 28 U.S.C. § 1331 for federal jurisdiction.

The first issue addressed by this Court in *National Farmers* was whether the case presented a federal question since the plaintiff's personal injury claim was not based on a federal statute or on a provision of the United States Constitution. Because federal law determines the scope of a tribe's sovereignty, however, this Court held that the extent of the civil jurisdiction of a tribal court can only be answered by reference to federal law and is thus a federal question under § 1331. *Id.* at 852.

After finding the existence of a federal question, this Court required that the tribal court first be given the opportunity to determine its own jurisdiction. The holding of *National Farmers*, therefore is two-fold: (1) the issue of the scope of a tribal court's jurisdiction is a federal question; and (2) actions first brought in tribal court are not subject to jurisdictional challenges in federal court prior to the exhaustion of tribal court remedies.

Two years later, this Court considered a challenge to a tribal court's jurisdiction in federal court under the diversity statute. In *Iowa Mutual*, two Blackfeet Indians filed suit in tribal court for damages arising from a motor vehicle accident on the Blackfeet Reservation. The complaint sought not only damages for personal injuries, but damages against the insurance companies for bad faith refusal to settle. The insurance companies filed a motion in tribal court to dismiss for lack of jurisdiction. Finding that it had subject matter jurisdiction, the tribal court denied the motion.

Rather than proceeding further in tribal court, the insurers filed a federal court action seeking a declaratory judgment that they had no duty to defend or indemnify under the terms of their insurance polices. The district court dismissed the complaint for lack of subject matter jurisdiction.

This Court held that the district court did have subject matter jurisdiction. In so holding, this Court ruled that the exhaustion rule set forth in *National Farmers* does not deprive federal courts of jurisdiction. This Court went on to hold, however, that the exhaustion rule established in *National Farmers* applied equally to diversity cases, and that only the tribal court's determination of jurisdiction is subject to federal review. Unless tribal court jurisdiction is determined to be improper by a federal court, the merits of the case cannot be reconsidered.

Except for the issue of tribal court jurisdiction, neither *National Farmers* nor *Iowa Mutual* involved the interpretation or analysis of the exhaustion rule and the determination of federal questions. The circuit courts, however, are in conflict regarding whether, and how, the exhaustion rule should be applied in such cases. This is particularly important in light of the statement in *Iowa Mutual* that, once the matter is determined by a tribal court, the merits of the case cannot be reconsidered by a federal court. At one end of the spectrum are those circuit court decisions holding that exhaustion is mandatory for all cases arguably within a tribal court's jurisdiction. On the other hand, are those circuit court decisions holding that exhaustion is not mandatory, but is dependent on a particularized inquiry.

The mandatory exhaustion cases are best illustrated by decisions of the Tenth Circuit. For example, in *Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1991), the Tenth Circuit held that exhaustion also applies to cases in which federal courts have concurrent jurisdiction under 28 U.S.C. § 1343(a)(3). In so holding, the Court posited that *National Farmers* and *Iowa Mutual* established "an inflexible bar" to a federal district court considering the merits of a petition prior to exhaustion of tribal court remedies. *Id.* at 445. *See, also, Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992) (exhaustion appropriate in cases arising off the reservation); *Texaco, Inc. v. Zah*, 5 F.3d 1374 (10th Cir. 1993)(when the dispute arises on the reservation, exhaustion is "an inflexible bar"; but when the dispute arises off the reservation, district courts should examine the *National Farmers* factors to determine if exhaustion is appropriate).

The Ninth Circuit in *Burlington Northern R.R. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 3013 (1992), heard a challenge to a tribe's attempt to tax a railroad right-of-way running through the reservation. The court rejected the tribe's assertion that exhaustion was required:

> Burlington Northern's failure to exhaust is not a bar to jurisdiction, and the district court did not abuse its discretion by reaching the merits. The complaint presents issues of federal, not tribal law; no proceeding is pending in any tribal court; the tribal court possesses no special expertise; and exhaustion would not have assisted the district court in deciding federal law issues.

Id. at 901 n.2 (citations omitted).

A scant four months later, however, in *Burlington Northern R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991), the Ninth Circuit required abstention in a challenge to a tribal ordinance regulating railroads crossing the reservation. There, the Ninth Circuit stated that exhaustion is a mandatory prerequisite to a federal court's exercise of its concurrent jurisdiction. *Id.* at 1245.

Prior to the decision below, in *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993), the Eighth Circuit rejected an exhaustion claim. There, an electric utility operating a nuclear power plant brought a federal court action seeking a declaratory judgment that a tribal ordinance regulating the transportation of nuclear materials was preempted by the Hazardous Materials Transportation Act ("**HMTA**"). The tribal ordinance, in part, required the transporters of nuclear material to obtain a separate tribal license for each shipment. The tribe argued that the plaintiff should first have exhausted tribal remedies. The Eighth Circuit summarily held that the HMTA preempted the tribal ordinance, thereby leaving plaintiff with nothing to exhaust. *Id.* at 463. *Accord, Public Service Company of Colorado v. Shoshone-Bannock Tribes*, 30 F.3d 1203 (9th Cir. 1994).

In the case below, the court spoke of exhaustion in mandatory terms. According to the Eighth Circuit, the exhaustion rule requires that a tribal court first determine whether the subject tax and employment statutes fall within the exceptions set forth in *Montana v. United States*, 450 U.S. 544 (1981). *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994).

In contrast, the Seventh Circuit follows a particularized inquiry test. In *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir. 1993), the Seventh Circuit ruled that it was necessary to first examine the factual circumstances of each case to determine whether exhaustion should apply. Finding that the dispute in *Altheimer* involved primarily issues of state and federal law, the Seventh Circuit declined to impose the exhaustion rule. *Id.* at 814.

Rule 10.1(a) of the Rules of the Supreme Court of the United States provides that conflict among circuit courts is an important factor mitigating in favor of certiorari review. The issue of whether a federal court should decline to resolve a controversy properly before it, but also within the jurisdiction of a tribal court, involves substantial policy questions. Such policy questions include the right of a litigant to a federal forum, the determination of which court should be the final arbiter of federal law, and the relationship between federal and tribal courts. Due to the inconsistent interpretations among the circuit courts and the importance of the foregoing policies, this Court should grant certiorari review.

II. THE CIRCUIT COURT DECISIONS APPLYING A MANDATORY EXHAUSTION RULE CONFLICT WITH THIS COURT'S DECISIONS HOLDING THAT FEDERAL COURTS SHOULD EXERCISE THEIR JURISDICTION.

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976), this Court discussed the strict limitations of the abstention doctrine:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. . . . "

See, also, New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350 (1989)("only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States"). Requiring mandatory abstention when there is no pending tribal court proceeding runs counter to the "unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817.

This Court has not required exhaustion in any decision addressing the authority of a tribe to regulate the activities of non-members. In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), the issue was the authority of a tribe to impose a zoning ordinance over fee lands owned by non-Indians but located within reservation boundaries. Similarly, in *South Dakota v. Bourland*, ___ U.S. ___, 113 S.Ct. 2309 (1993), this Court faced the issue of whether a tribe could prohibit hunting by non-Indians on non-trust land located within the reservation. Resolution of the merits in both *Brendale* and *Bourland* involved interpretation of federal law. Moreover, this Court decided both *Brendale* and *Bourland* long after *Iowa Mutual*. Yet this Court did not require abstention in either case. In considering *Bourland* on remand, the Eighth Circuit suggested that issues

involving attempted tribal regulation of activities in private enclaves within the exterior boundaries of reservations should be heard in federal court. *South Dakota v. Bourland,* 1994 WL 605890, *2 (8th Cir. Nov. 7, 1994).

Abstention in cases involving the interpretation of federal law going to the merits of a controversy is not appropriate in light of this Court's statement in *Iowa Mutual* that, after abstention in favor of a tribal court, federal courts may not reconsider the merits. This, in effect, makes tribal courts the final arbiter of federal law in every case having an Indian reservation nexus. In requiring mandatory abstention in this case, the Eighth Circuit assumed that federal courts could later reconsider the conclusions of the tribal court as to whether the subject tax and employment statutes were appropriate under *Montana v. United States,* 450 U.S. 544 (1981):

> [W]e note that the Tribe may have a heavy burden justifying these tax and employment statutes under the *Montana* exceptions but that caveat does not alter our conclusion that this issue is for the Tribal Court to determine *in the first instance.*

Duncan Energy, 27 F.3d at 1301 (emphasis added). This assumption is of dubious validity in light of this Court's earlier statement in *Iowa Mutual* that federal courts cannot rehear the merits if it is determined that the case was properly within the tribal court's jurisdiction.

CONCLUSION

For these reasons, RMOGA respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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November 28, 1994

(4)

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No. 94-689

In The

Supreme Court of the United States

October Term, 1994

Duncan Energy Company, NBB Oil & Gas Partners (U.S.A.), Amerada Hess Corporation, Tyrex Oil Company and Turtle Mountain Gas & Oil, Inc.,

Petitioners,

v.

The Three Affiliated Tribes of the Fort Berthold Reservation; Three Affiliated Tribes Tribal Business Council; Three Affiliated Tribes Tax Commission; Wilbur D. Wilkinson, Chairman, Tribal Business Council; Joseph J. Walker, Tax Commissioner; and Marcus Wells, Jr., Director Tribal Employment Rights Office,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF NORTH DAKOTA, ALABAMA, ARIZONA, COLORADO, FLORIDA, MONTANA, NEVADA, SOUTH DAKOTA, UTAH AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The amici curiae states, through their respective Attorneys General, respectfully submit this brief pursuant to S. Ct. R. 37 in support of the petition for writ of certiorari.

INTEREST OF THE AMICI STATES

The federal judiciary has long had primary responsibility for resolving disputes over state and tribal regulatory authority in Indian country. Most of these disputes have involved the scope of state jurisdiction, but more recently the Court has been asked to determine the reach of tribal regulatory power. "In all of these cases, the governing rule of decision has been provided by federal law." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985). The first question presented here is whether, when tribal power is contested, the exercise of federal jurisdiction should be conditioned on the challenger's first invoking and exhausting tribal administrative and judicial remedies. The second question is whether such tribal power exists.

The amici states have two substantial interests in how these questions are answered. The first is practical. Jurisdictional controversies between tribes and states are common. Many are resolved without litigation, but access to federal court for timely injunctive or declaratory relief can be critical. Although the exhaustion requirement adopted by the Court of Appeals presumably will have no effect on a tribe's access to federal court to vindicate inherent regulatory authority, it can serve to deny states or other nontribal entities a ready federal forum to

resolve disputes over tribal regulatory authority. It is a suspect rule which accords one group of litigants the right to immediate federal relief for the purpose of establishing a power but denies another group such right for the purpose of contesting that power. The second issue is critical to the amici since the existence of inherent tribal regulatory power not only can effect the scope of state authority (*e.g., Rice v. Rehner*, 463 U.S. 713, 723-24 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)) but also can influence whether and to what extent concurrent regulatory power is used (*cf. Northern Border Pipeline Co. v. Montana*, 772 P.2d 829, 837-38 (1989) (Weber, J., concurring)).

Beyond these practical concerns, however, lie notions of federalism. The Court of Appeals extrapolated from *National Farmers Union* and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), the conclusion that any dispute with a tribe or tribal member over "reservation affairs" is subject to exhaustion. That reading distorts the reasoning of those decisions and creates an anomalous exception to the "virtually unflagging obligation [of federal courts] . . . to exercise the jurisdiction given them." *Colorado River Water Conservation District, et al. v. United States*, 424 U.S. 800, 817 (1976). In the context of federal-state relations, principles of federalism or judicial efficiency have counseled abstaining from or deferring the exercise of § 1331 jurisdiction in certain instances, yet even those principles have never cut so deeply into that exercise as the exhaustion doctrine espoused below. The amici are troubled that "an Indian tribe's [administrative law and] judicial system is entitled to a greater degree of

deference than the [administrative law and] judicial system of a sovereign State." *Iowa Mutual*, 480 U.S. at 22 (Stevens, J., concurring & dissenting).

SUMMARY OF THE ARGUMENT

The Court has considered and resolved questions of the inherent civil regulatory power of Indian tribes over the on-reservation conduct of nonmembers without requiring exhaustion of tribal adjudicatory remedies. *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981). Its decision in *National Farmers Union* did not mark a watershed break in this practice. Instead, it established only a requirement that, when a tribe's civil adjudicatory power in an *ongoing* tribal court proceeding is challenged, the exercise of jurisdiction under 28 U.S.C. § 1331 must await conclusion of its resolution by the tribal court.

The Court of Appeals' decision expands the *National Farmers Union* exhaustion doctrine to encompass any claim questioning the existence of a tribe's civil regulatory authority over nonmember conduct or lands because such claim is deemed to implicate "reservation affairs." It also expands the doctrine as it was applied in *Iowa Mutual*. There, the Court deferred exercise of jurisdiction over an insurance contract-interpretation claim integrally related to causes of action filed against Iowa Mutual, the

federal court plaintiff, in a preexisting tribal court proceeding. *Iowa Mutual*, like *National Farmers Union*, represents a limited incursion into the ordinary duty of federal courts to exercise congressionally conferred jurisdiction, not a wholesale repudiation of that duty.

Not only is there no Indian law decision from this Court justifying the Court of Appeals' decision, but it also finds no analogue in *Younger v. Harris*, 401 U.S. 37 (1971), *Colorado River Water Conservation District, et al. v. United States*, 424 U.S. 800 (1976), or their progeny. These decisions seek, as a general matter, to avoid federal court interference with or duplication of state judicial proceedings. Whatever their precise scope, they do not provide an analytical basis for exhaustion where only a federal law-based claim is involved and no tribal administrative or judicial proceedings have been commenced.

The Court has stressed repeatedly the federal judiciary's "virtually unflagging obligation" to exercise its jurisdiction. *Colorado River*, 424 U.S. at 817. Federal courts have no dispensation from this general rule merely because a claim challenges a tribe's civil regulatory authority over nonmembers. Unimpeded access to a federal forum is instead particularly essential in such cases because federal courts often provide the only forum in whose impartiality tribes and nonmembers alike have confidence. The Petition thus presents an important question over the scope of the *National Farmers Union* exhaustion doctrine – a question which should be decided now.

Equally important is the second question presented in the Petition: whether tribal regulatory jurisdiction

exists over the Petitioners' oil and gas extraction activities pursuant to leases with nonmember property owners in a defined area of the Fort Berthold Reservation where 98% of the land is held in fee by nonmembers. *Montana* established a presumption against such jurisdiction subject arguably to two exceptions, and that presumption has been more recently applied in *Brendale* and *Bourland*. Nevertheless, the divided nature of the opinions in *Brendale*, together with ambiguity in *Bourland* concerning the source of the *Montana* exceptions, promise to create, and indeed have created, confusion in lower courts concerning the second exception. Because the scope of inherent tribal jurisdiction over nonmembers is far too sensitive a matter to be left to confusion, the Court instead should clarify the controlling principles.

ARGUMENT

I. *NATIONAL FARMERS UNION* ESTABLISHED A NARROW EXCEPTION TO THE ORDINARY OBLIGATION OF FEDERAL COURTS TO EXERCISE JURISDICTION UNDER 28 U.S.C. § 1331 WHEN PROPERLY INVOKED. THE COURT OF APPEALS' DECISION FAILS TO RECOGNIZE THE LIMITED NATURE OF THAT EXCEPTION AND OTHERWISE CONFLICTS WITH ANALOGOUS DECISIONS.

A.

National Farmers Union was the Court's first case in which the issue of tribal civil adjudicatory jurisdiction over nonconsenting nonmembers was raised. Two questions were presented in *National Farmers Union*: whether

jurisdiction under 28 U.S.C. § 1331 existed with respect to a claim by an insurance company and its insured, a state school district, that a tribal court lacked subject matter jurisdiction to enter and enforce a judgment against the district in an ongoing personal injury action, and, if § 1331 jurisdiction did exist, whether tribal adjudicatory jurisdiction was present. The Court held that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." *Id.* at 852. Nonetheless, it further held that the exercise of § 1331 jurisdiction should be stayed to "provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge" and that only after the plaintiffs' exhaustion of "the remedies available to them in the Tribal Court system" should a federal court address the merits of their challenge. *Id.* at 856, 857. The exhaustion requirement announced in *National Farmers Union* therefore derived directly from a determination that it would be inappropriate to interfere with enforcement of a tribal court judgment, and the associated proceedings to determine its validity, until such tribal court had been given an opportunity to consider the jurisdictional challenge.

Nothing in *National Farmers Union* suggests it was intended to usher in a new era of federal courts' deferring to tribal administrative and judicial processes all challenges to a tribe's regulatory jurisdiction, even when there exist no tribal proceedings in which the federal court plaintiff is a party or in privity with a party. The subsequent decision in *Iowa Mutual* similarly was not a

marked change in the exercise of federal jurisdiction. *Iowa Mutual* differed from *National Farmers Union* because it involved not a challenge to tribal court jurisdiction but a federal diversity action commenced by an insurance carrier to litigate an issue related to liability asserted against it in an ongoing tribal court proceeding. The Court concluded that deferring exercise of federal jurisdiction was appropriate because, "[a]s *National Farmers Union* indicates, proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors.' " *Id.* at 17. Although *Iowa Mutual* was distinguishable from *National Farmers Union* in important respects (*id.* at 20 (Stevens, J., concurring & dissenting)), it nevertheless was aimed specifically at protecting the integrity of tribal court proceedings initiated before the federal action.

B.

The Court of Appeals, in its reversal of the District Court, broadened the reach of the *National Farmers Union* exhaustion doctrine to encompass jurisdictional challenges unrelated to an ongoing tribal adjudicatory proceeding. The court ruled that because the Petitioners' challenged the Three Affiliated Tribes' inherent authority to enforce its employment and taxation laws against nonmembers on fee lands, it is "a dispute arising on the Reservation" which triggers the exhaustion requirement. Pet. at 12a; *Duncan Energy Co., et al. v. Three Affiliated Tribes, et al.*, 27 F.3d 1294, 1300 (8th Cir. 1994). That the Petitioners did not challenge the jurisdiction of any tribal adjudicatory entity in an ongoing proceeding was deemed immaterial. Every challenge to tribal jurisdiction

must, according to the lower court, be examined "in the first instance by the tribal court itself." Pet. at 12a; 27 F.3d at 1299. It approved of language describing this rule as " 'inflexible' " and " 'mandatory.' " Pet. at 12a; 27 F.3d at 1300.

The Court of Appeals viewed its decision as so squarely falling within the scope of the *National Farmers Union* exhaustion doctrine as not to require careful consideration of the "virtually unflagging obligation [of federal courts] . . . to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817. *National Farmers Union* nonetheless does not stand for the proposition that, merely because a federal court plaintiff challenges a tribe's regulatory jurisdiction, exhaustion of tribal administrative and judicial remedies must occur absent any exception to the exhaustion requirement. *See National Farmers Union*, 471 U.S. at 856 n.21. Accepting such a broad reading of *National Farmers Union* effectively would foreclose immediate federal court access in a class of cases to which § 1331 jurisdiction indisputably exists and over which federal courts routinely have exercised such jurisdiction. *E.g. South Dakota v. Bourland*, 113 S. Ct. 2309 (1993); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981).

Here, the principal justification for application of the *National Farmers Union* exhaustion rule is vindication of tribal self-government and self-determination interests. Pet. at 10a-11a; 27 F.3d at 1299. To use those interests as the basis for broadening the exhaustion doctrine, however, loses sight of the notion that in *National Farmers*

Union "the policy of supporting tribal self-government and self-determination" was defined only as "favor[ing] a rule that would provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." 471 U.S. at 856. The self-government interest at stake in *National Farmers Union* was the tribal court's right to complete its adjudication before review of its jurisdictional determination by a federal court. It is one thing to say that, once sued in tribal court, a litigant ordinarily must complete that adjudicatory process before seeking to void the tribal court's actions on jurisdictional grounds, but it is quite another to require a litigant to invoke a tribe's regulatory or adjudicatory jurisdiction for the purpose of arguing that such jurisdiction does not exist. The latter proposition makes no sense and, unsurprisingly, finds no support in a fair reading of *National Farmers Union* or *Iowa Mutual.*

The Court of Appeals' two other justifications for exhaustion – judicial efficiency and " 'encourag[ing] tribal courts to explain to the parties the precise basis for accepting jurisdiction,' " Pet. at 10a; 27 F.3d at 1300 – do not apply when no tribal adjudicatory proceedings are ongoing and only federal law questions are presented. Deferring exercise of § 1331 jurisdiction under those circumstances promotes delay, not efficiency, since initiation of a separate administrative or judicial proceeding in a different forum is necessary. Procedural difficulties are unlikely to occur in a single, federal action. Where a tribal court has not exercised jurisdiction, the third justification similarly has no role. The "benefits of tribal explanations and expertise," *Burlington Northern Railroad Co. v. Crow Tribe*, 940 F.2d 1239, 1246 (9th Cir. 1991), can be realized

through the Tribes' participation in the federal proceeding.

The Court of Appeals' expansion of the exhaustion requirement not only outstrips the analytical reach of *National Farmers Union* but also finds no counterpart in other decisional authority concerned with the appropriate exercise of federal jurisdiction. The most closely analogous of such authority is that alluded to in *National Farmers Union* – abstention in accord with principles derived from *Younger v. Harris*, 401 U.S. 37 (1971) – and In *Iowa Mutual* – deferral in accord with principles derived from *Colorado River. National Farmers Union*, 471 U.S. at 856 n.21; *Iowa Mutual*, 480 U.S. at 16 n.8.

With respect to *Younger*, the Court has said:

> Under *Younger*-abstention doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests. . . . *Younger* abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in the federal court.' . . . in other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them.

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 237-38 (1984); *accord Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2216 (1992) ("Though we have extended *Younger* abstention to the civil context, . . . we have never applied the notions of comity so critical to *Younger's* 'Our Federalism' when no

state proceeding was pending nor any assertion of important state interests made"); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14 (1987) ("Both *Juidice [v. Vail*, 430 U.S. 327 (1977)] and this case involve challenges to the processes by which the state compels compliance with the judgments of its courts. Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand"); *see generally* Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 349 (2d ed. 1990) ("Perhaps the strongest of the four reasons for *Younger* deference is the desire to avoid interference with the state judicial process. . . . [T]he state retains an inherent interest in not having its judicial process grind to a halt while the federal courts decide constitutional questions").

Colorado River deferral is directed at promoting judicial efficiency, not as in *Younger* at furthering federalism, and has a tightly restricted range. "[T]he circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Colorado River*, 424 U.S. at 818. In contrast to the Court of Appeals' decision, which predicates deferral simply on the ground that the Tribes' regulatory jurisdiction has been challenged, *Colorado River* requires the existence of

"exceptional" circumstances, *id.*, before "the contemporaneous exercise of concurrent jurisdictions," *id.* at 817, will be deemed inimical to judicial administration interests. That such exceptional circumstances do not exist here, where federal law governs resolution of the Petitioners' claims, is underscored by the Court's analysis in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 25-26 (1983), in which *Colorado River* deferral was denied:

> [W]e emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. Although in some rare circumstances the presence of state-law issues may weigh in favor of that surrender, . . . the presence of federal-law issues must always be a major consideration weighing against surrender.

Even if *Iowa Mutual* set a lower threshold for deferral in determining the merits of a nonfederal law dispute when concurrent federal and tribal court proceedings exist, nothing in that opinion indicates deferral is required when only federal law issues are presented and concurrent proceedings do not exist. *See Iowa Mutual*, 480 U.S. at 21-22 (Stevens, J., concurring & dissenting). Indeed, the lack of concurrent proceedings vitiates the very rationale for *Colorado River* deferral: wise judicial administration.

The importance of clarifying the scope of the *National Farmers Union* exhaustion requirement is clear. The Court

of Appeals' decision represents an abdication by the federal judiciary of its central role in deciding difficult questions of governmental authority on Indian reservations. The amici states regularly are confronted with the task of reconciling competing jurisdictional claims on reservations. This task not only is legally complex but also presents substantial social and political difficulties. Tribes and their members often assert that state forums are insensitive to their interests, and nontribal members voice comparable concerns about tribal forums. Federal courts accordingly remain in many instances the only forum with the perceived ability to impartially resolve jurisdictional questions. In addition, the Court of Appeals' decision conflicts with the obligation of federal courts to exercise their jurisdiction when properly called upon by litigants to do so. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358-59 (1989); *see also McCarthy v. Madigan*, 112 S. Ct. 1081, 1087 (1992); *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988). The sensitive nature of the federal issues involved here and the disregard of the Petitioners' appropriate invocation of § 1331 jurisdiction warrant review of the first question.

II. WHETHER TRIBAL REGULATORY JURISDICTION EXISTS OVER THE PETITIONERS IS APPROPRIATE FOR RESOLUTION AND PRESENTS SQUARELY THE SCOPE OF THE SECOND *MONTANA* EXCEPTION.

The Petitioners' oil and gas drilling activities occur on nonmember lands within an area of the Fort Berthold Reservation opened for homesteading under the Act of June 1, 1910, 36 Stat. 455, and the Act of August 3, 1914,

38 Stat. 681. This area is known as the "Northeast Quadrant." Pet. 27a. The quadrant contains over 360,000 acres, 97.7% owned in fee by nonmembers. *Id.* 27a-28a. The tribal regulation at issue – two taxation ordinances and one employment preference ordinance – apply to the Petitioners simply because they engage in such activities on the reservation and without reference to whether those activities involve a consensual relationship with the Tribes or occur on tribal lands. In fact, the Petitioners' activities are conducted exclusively on nonmember lands under leases executed with those lands' owners. *Id.* 28a. The Court of Appeals reversed the District Court's determination that the Tribes lack regulatory jurisdiction, concluding that the lower court had "erred by failing to analyze the applicability of the *Montana* exceptions and by finding this exercise of regulatory authority to be impermissible as a matter of law." Pet. 9a; 27 F.3d at 1299.

In *Montana v. United States*, 450 U.S. 544, 565 (1981), the Court noted "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." However, it then observed:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands

> within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66 (citations omitted). The Court of Appeals' decision raises an important question concerning the existence of tribal regulatory jurisdiction over the Petitioners under the second exception.[1]

The answer to that question must be informed by the Court's decisions in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993). In *Brendale*, which involved application of tribal zoning regulations, four members of the Court reasoned that the second *Montana* exception "should . . . not be understood to vest zoning authority in the tribe when [nonmember] fee land is used in certain ways" because "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." 492 U.S. at 430 (White, J.). Instead, a tribe may have a federally "protectible interest . . . defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health or welfare of the tribe," *id.* at 430-31, which can be vindicated through participation in state administrative proceedings or, if necessary, through federal court relief

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[1] Although the Court of Appeals reversed the District Court for not applying either exception, the first clearly has no application. The regulated activity of the Petitioners involves contracts with nonmembers, and there is no suggestion in the District Court's findings of any consensual relationship with the Tribes or their members.

against any "demonstrably serious" impact of the nonmember activity deemed to "imperil" the protectible interest. *Id.* at 431.

Two other members of the Court applied a different standard, that is, whether the tribe retains the power to exclude nonmembers from the area sought to be regulated. *Id.* at 444-45 (Stevens, J.) Those Justices found no such authority in one case when approximately one-half of the land in the affected area was owned in fee by nonmembers but found regulatory power as to a nonmember parcel situated in an area composed almost exclusively of tribal lands and into which the tribe controlled access. *Id.* at 438-39, 444; *see also id.* at 447 ("[I]t is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominately owned and populated by nonmembers, who represent 80 percent of the population yet lack a voice in tribal governance").

Bourland involved the exercise of tribal authority over nonmember hunting and fishing on lands taken by the federal government for flood control purposes. The Court reiterated that, under *Montana* and *Brendale*, "when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former [treaty-based] right of absolute and exclusive use and occupation of the conveyed lands" and that "[t]he abrogation of this greater right, at least in the context of the type of [open, nonpristine] area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others." 113 S. Ct. at 2316; *accord id.* at 2317 ("an abrogated treaty right of unimpeded use and occupation of lands 'can no longer serve as the basis for tribal exercise

of the lesser included power' to regulate"); *id.* at 2318 ("regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control").

In light of congressional action "clearly abrogat[ing] the Tribe's pre-existing regulatory control over non-Indian hunting and fishing," the Court further rejected the contention that the tribe retained inherent authority to regulate. *Id.* at 2319-20; *see also id.* at 2320 n.15. Notwithstanding the latter conclusion, the Court then stated that "[t]he question remains . . . whether the Tribe may invoke other potential sources of tribal jurisdiction over non-Indians on these lands" and remanded for determination of the applicability, if any, of the *Montana* exceptions. *Id.* at 2320.

The analysis in *Bourland* warrants clarification. As *Montana* indicates, the exceptions to the "general proposition" that tribes lack regulatory jurisdiction over nonmembers are grounded in the residue of inherent sovereign power. It is thus problematic to characterize those exceptions, and the authority the Court of Appeals deemed may flow from them, as arising from "other potential sources of tribal jurisdiction." Put simply, eliminating inherent tribal sovereignty as a source of regulatory power logically should obviate the need to consider whether the second *Montana* exception applies.

The Court, finally, should determine definitively whether the second exception has vitality and, if so, the

standards to be used in resolving its applicability. The plurality opinion in *Brendale* held that, in a zoning context, the second exception will never form a predicate for the exercise of tribal regulatory jurisdiction and, under land ownership and demographic characteristics less skewed to nonmember dominance than those here, two other Justices concurred in the plurality's result with respect to the "open" area. It is accordingly unremarkable that the District Court found no reason to apply the second exception.[2]

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[2] In this regard, the factual showing made by the Tribes concerning the second exception's alleged applicability is telling. Its affidavits contended in general terms that the Petitioners' oil and gas extraction activities had adverse environmental effects on the Reservation and tribal members. *Duncan Energy Co. v. Three Affiliated Tribes*, No. 93-3622 (8th Cir.), Applts.' App. at Tabs O, P, S. Even if one leaves aside the question whether the conclusory allegations in the affidavits satisfied the "demonstably serious" and "imperil" requirements imposed under the *Brendale* plurality opinion, two facts stand out. First, none of the asserted harm from the petitioners activity is regulated or mitigated by the taxation and employment preference ordinances at issue, i.e., the Petitioners can continue their oil and gas extraction, regardless of its harmful effects, as long as they pay tribal taxes and observe the obligations imposed under the tribal employment relations ordinance. Second, the alleged harm – off-fee land effects of on-fee land conduct – appears qualitatively no different from that which the *Brendale* plurality concluded should be ameliorated through nontribal administrative or judicial remedies. Any suggestion that the petitioners' activities contribute to unemployment on the reservation and therefore have an effect on the Tribes seems farfetched, since presumably the amount of unemployment would be no less were the petitioners to cease their extraction work.

Jurisdictional disputes of the type presented here are becoming increasingly common, and only this Court can provide the guidance essential to resolving them efficiently and consistently. Indeed, the need for guidance is perhaps reflected best in the Court of Appeals' recent remand decision in *Bourland* itself. *South Dakota v. Bourland*, Nos. 90-5486 & 90-5515, 1994 WL 605890 (8th Cir. Nov. 7, 1994). There, a majority of a three-judge panel held that the tribe had failed to justify application of the second *Montana* exception but declined to "consider [or] decide whether Justice White's *Brendale* opinion modified the second *Montana* exception for cases such as that presented here." *Id.* at *n.4. The dissenting judge believed the second exception applied because, in his view, the terms "threatens" and "has some direct effect" in the second exception's formulation should be read disjunctively and any nonmember conduct with a non-de minimis effect on tribal interests is sufficient to justify exercise of tribal regulatory power. *See id.* at *3 ("The district court erred in applying the higher standard articulated in the *Brendale* plurality opinion. The second *Montana* exception clearly covers conduct that threatens *or* has a direct effect on the Tribe. I see nothing in the Supreme Court's *Bourland* decision, which remanded this case, to indicate that *Brendale* altered the inquiry under *Montana*"). The time has come to address this significant issue.

CONCLUSION

The amici states respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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No. 94-669

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DUNCAN ENERGY COMPANY, NBB OIL & GAS PARTNERS (U.S.A.), AMERADA HESS CORPORATION, TYREX OIL COMPANY AND TURTLE MOUNTAIN GAS & OIL, INC.,
Petitioners,

v.

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION; THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL; THREE AFFILIATED TRIBES TAX COMMISSION; WILBUR D. WILKINSON, CHAIRMAN, TRIBAL BUSINESS COUNCIL; JOSEPH J. WALKER, TAX COMMISSIONER; AND MARCUS WELLS, JR., DIRECTOR, TRIBAL EMPLOYMENT RIGHTS OFFICE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONERS' REPLY BRIEF

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OCTOBER TERM, 1994

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v.

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION; THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL; THREE AFFILIATED TRIBES TAX COMMISSION; WILBUR D. WILKINSON, CHAIRMAN, TRIBAL BUSINESS COUNCIL; JOSEPH J. WALKER, TAX COMMISSIONER; AND MARCUS WELLS, JR., DIRECTOR, TRIBAL EMPLOYMENT RIGHTS OFFICE,

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PETITIONERS' REPLY BRIEF

I. RESPONDENTS IMPROPERLY RELIED ON THE PRECEDENTIAL EFFECT OF THE COURT'S DENIAL OF CERTIORARI IN ANOTHER CASE TO OPPOSE ISSUANCE OF THE WRIT HERE, CONSEQUENTLY FAILING TO ADDRESS RESPONDENTS' ARGUMENTS THAT EXHAUSTION UNDER THESE FACTS WOULD BE ANOMALOUS AND THE AMICI'S ARGUMENTS THAT A CONFLICT EXISTS BETWEEN CIRCUITS AND WITHIN CIRCUITS AS TO THE CONTOURS OF THIS DOCTRINE.

1. The Respondents ("Tribes") rely on the Court's denial of certiorari in another case, *Middlemist v. Babbitt*, No. 94-42, 63 U.S.L.W. 3346 (U.S. Oct. 31, 1994), in

opposing certiorari here, erroneously assuming such denials have precedential effect. To be sure, Petitioners ("Duncan Energy") alerted the Court to what they considered to be a similar case raising issues worthy of the Court's review. In denying certiorari in *Middlemist*, however, the Court did not foreclose review of similar or even identical issues. The Tribes improperly argue the contrary. Employing this improper tactic, the Tribes do not assist the Court in evaluating this case.

2. The issues presented here, while related to those in *Middlemist*, do not arise in the same procedural condition and, in fact, present a better vehicle for reviewing and resolving important issues of tribal jurisdiction and the operation of the federal judiciary. As ably described in the brief of the Amicus Curiae, Rocky Mountain Oil and Gas Association ("RMOGA"), conflicts between the circuits and within circuits have arisen in the handling of such cases. In this case, unlike *Middlemist*, both the District Court and the Circuit Court took time to explain their reasoning for not requiring exhaustion of tribal remedies on the one hand and for reversing that decision on the other. In doing so, the District Court canvassed the variety of opinions from federal courts and wisely concluded that "under the facts of this case"—that is, a challenge to a tribe's assertion of sovereign power brought by a nonmember engaged in actviity on nonmember land prior to the initiation of any tribal proceeding [1]—exhaustion was not required. A24. In reversing, the Circuit

[1] These particular facts were crucial to the District Court's decision and should be central to any decision explicating this doctrine. The District Court's decision implicitly recognized the importance of two factors: whether the matter involves internal tribal affairs, for example, activity on tribal land or the fact of a tribal member as a party to the activity (not the lawsuit); and whether any tribal proceedings have begun. See A23-24 citing *United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273 (8th Cir. 1987); *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986); *Myrick v. Devils Lake Sioux MFG. Corp.*, 718 F.Supp. 753 (D.N.D. 1989).

Court adhered to the rule fashioned by the Ninth Circuit that any matter "arising on a reservation" must first go through tribal forums. A12. The overbreadth of this application of the *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987) doctrine seems obvious when one considers that (1) Tribes, under controlling federal law, are not territorial sovereigns, (2) the existence of asserted tribal sovereign power over nonmembers is a purely federal issue, (3) that many legal contests arise on reservations involving no tribal members, (4) and that, in the application of similar doctrines to the adjudication of federal issues arising within a state and even involving state and local governments, whether there is or is not an ongoing state proceeding is the key criterion. *Steffel v. Thompson*, 415 U.S. 452, 462-463 (1974); *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*").

Indeed, employing strong language [2] the Eighth Circuit's concurring opinion revealed misgivings about requiring exhaustion of tribal remedies in the absence of ongoing proceedings in a manner indicating the validity of Duncan Energy's request that the Court address this important issue and provide guidance. A15-17. Moreover, in this case both the issues presented—whether exhaustion should be required and whether the second exception to the general principle that Tribes lack sovereign authority over nonmembers established in *Montana v. United States*, 450 U.S. 544 (1981), could allow the Tribes to exercise the jurisdiction under challenge here—were fully litigated. As to each issue, the District Court received motions, briefs, and affidavit testimony. Each set of parties had a full opportunity to submit facts and legal arguments in

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[2] "Requiring 'exhaustion' in a forum not chosen by any party looks like a subversion of the 'virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.' *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)." A17.

support of their position as to each issue. The Circuit Court received full briefing on each issue and reviewed the case with the benefit of a record which each set of parties had the opportunity to fully develop. Thus, this case presents the Court the opportunity to review the entire litigative process employed by the District Court and rejected by the Circuit Court to fashion guidelines based on general principles which can be applied by the ever-growing number of District Courts faced with cases of this kind. *Middlemist*, in contrast, did not present such a full record because the District Court had granted the Tribes' motion to dismiss on exhaustion grounds and the matter had not proceeded to the substantive issue of tribal jurisdiction over nonmember activity on fee-owned lands.

3. As indicated by the Tribes' reliance on the denial of certiorari in *Middlemist*, should the Court deny certiorari here it should do so fully aware that the state of the law as to exhaustion, while clearly in disarray, will appear to lean heavily toward requiring exhaustion in all cases "arising on a reservation" no matter what the factual circumstances, the procedural posture, or the legal issues presented. While denial of certiorari is not to be construed as having any precedential effect, denial in this case will without question be construed as a pronouncement of law to the effect that all cases "arising on a reservation" must first go through any and all tribal forums. In that case, access to a federal forum for parties involved in such matters, while perhaps theoretically available after much delay[3], will have numerous obstacles, which, as a practical matter, will prove insurmountable to most litigants.

This state of affairs, Duncan Energy respectfully submits, stands at odds with the historic solicitude shown by

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[3] This, perhaps, is also uncertain, as noted by both the District Court (A23) and the concurrence in the Court of Appeals (A15-16), since in *Iowa Mutual, supra*, the Court appeared to foreclose federal review of issues decided by tribal courts. *Iowa Mutual*, 480 U.S. at 19.

this Court and the lower federal courts for ensuring access to federal courts to resolve federal questions and protect federal rights by requiring that they exercise their jurisdiction whenever invoked in all but the rarest circumstances. *Steffel*, 415 U.S. at 462-463; *NOPSI*, 491 U.S. at 358-59, 368. Since none of those circumstances are present here, a denial of certiorari and the requirement that Duncan Energy exhaust all tribal remedies even though none have yet been invoked cannot be squared with the Court's concern in all other types of cases to keep federal courts open to the litigation of federal issues.

4. Moreover, Duncan Energy submits that requiring exhaustion of remedies in this case is neither required by nor consistent with the Court's decisions establishing the doctrine. *National Farmers, supra; Iowa Mutual, supra.* Simply put the Tribes stretch these cases beyond their limits in arguing that exhaustion in the absence of ongoing proceedings is fully consistent with their holdings. In those cases there were ongoing proceedings, and both the analysis of the Court and the authorities on which it relied reveal that this fact was central to its decisions. To require exhaustion of tribal remedies in the absence of such proceedings would be to expand this doctrine beyond the limits of any comparable doctrine of abstention or exhaustion. If the Court intends the doctrine to have such a capacious sweep, this is not revealed in its decisions.

5. As outlined by the Amicus RMOGA, this has led to conflicts. The most recent cases indicate exhaustion is not required when a federal statute has preempted tribal sovereignty. *Public Service Co. of Colorado v. Shoshone-Bannock Tribes*, 30 F.3d 1203 (9th Cir. 1994); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993). These cases support Duncan Energy's position since it argues that the 1910 Act abrogated tribal sovereign authority over nonmember fee lands and *ipso facto* preempted the reassertion of such authority now over Duncan Energy's operations.

II. WHETHER THE SECOND *MONTANA* EXCEPTION COULD SERVE AS A FOUNDATION FOR THE TRIBES' ASSERTED POWER WAS FULLY ARGUED HERE, UNLIKE *MIDDLEMIST*, AND PRESENTS AN OPPORTUNITY TO CLARIFY THE CONTOURS OF THIS EXCEPTION, WHICH AT LEAST TWO COURTS HAVE SAID ARE UNCERTAIN.

6. This case, unlike *Middlemist*, presents for review a fully adjudicated application of the second *Montana* exception. The District Court took affidavit testimony and legal arguments on Duncan Energy's motion for summary judgment. The Tribes had every opportunity to demonstrate some factual basis for their assertion that they have sovereign power to impose the taxes and regulations at issue because of the harm to tribal interests caused by Duncan Energy's operations, thereby raising an issue of material fact. The District Court found the Tribes had failed in this and therefore held that the second *Montana* exception to the general principle that Tribes do not have civil regulatory jurisdiction over nonmembers does not apply and the Tribes could not have the jurisdiction they assert. A22, A29-31. In reversing this decision, the Circuit Court erroneously held that the lower court had not considered the *Montana* exceptions. A9. In fact, the District Court received specific arguments from the Tribes in support of their contention that they do have jurisdiction based on the second *Montana* exception. It rejected these arguments in granting summary judgment for Duncan Energy. The Court of Appeals held this to be "inappropriate" on the grounds the lower court had not analyzed the Tribes assertions of jurisdiction in light of the second *Montana* exception. The District Court's opinion and the affidavits and briefs submitted in support of and in opposition to Duncan Energy's motion for summary judgment reveal this is clearly erroneous. The District Court did in fact analyze the applicability of the *Montana* exceptions and found that in this case the Tribes failed to raise material issues of fact warranting a trial on their assertion that, contrary

to the general principle, they have sovereign authority over Duncan Energy's operations to extract taxes and impose tribal hiring preference laws.

7. The District Court not only analyzed the applicability of the *Montana* exceptions, but reached the correct conclusion based on the facts and legal arguments placed before it. Both lower courts recognized the centrality of the construction of the 1910 Act (Act of June 1, 1910, 36 Stat. 455) for this issue. The legislative history of that Act, which Duncan Energy presented to both lower courts, contains the following passage concerning the applicability of state or federal law to the lands opened to settlement:

> Mr. Stafford. When the land has been open to settlement, does the gentleman contend that the local state prohibition law will not apply on that reservation?
>
> Mr. Hanna. Certainly it will apply.
>
> * * * *
>
> Mr. Burke of South Dakota. Congress has not reserved in any way the operation of the state laws from this country except as to the sale of liquor, that liquor was to be authorized to be sold at any time in that country.
>
> * * * *
>
> Mr. Bartholdt. Before the gentleman proceeds, I merely want to call the attention of the committee to the fact that under a decision of the Supreme Court, which was recently cited in the discussion of a similar provision, the Indian who lives on allotted lands becomes subject to the laws of the state the very moment that he settles on such lands, and consequently he is free from all police regulations by Congress. This ruling of the Supreme Court applies even more strongly in this case than it did in the case cited the other day, when a similar proposition came up for discussion.

45 Cong. Rec. 5797, 5798 (May 4, 1910).

The Northeast Quadrant, as a result of this act which, it is clear, was intended to allow the law of North Dakota to regulate activity on fee lands, is now owned almost entirely (97.7 percent) by nonmembers. A27.

8. If exhaustion is appropriate even when there are no ongoing tribal proceedings, then, this case presents the opportunity to review whether one of the exceptions to that doctrine applies when the substantive issue can be summarily resolved, because of the Tribe's clear lack of the asserted authority based on uncontroverted facts as analyzed against federal enactments, legislative history and the principles of res judicata. In this case, for example, Duncan Energy would argue an exception to this doctrine should apply because of the demographic and landownership facts noted above and in the Petition, because of the intent of Congress in opening the Northeast Quadrant by enacting the 1910 Act, and, as to res judicata, because the Tribes have been adjudged to have been divested by Congress, using its plenary power (*Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)), of all interest in alienated lands in the Northeast Quadrant. *The Affiliated Tribes of the Fort Berthold Reservation v. United States*, 16 Indian Claims Commission 341 (1965).[4]

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[4] The Indian Claims Commission statute, Ch. 959, 60 Stat. 1049 (1946), authorized suits against the United States for compensation for taking of lands based on all legal, equitable claims. The Tribes, therefore, sued seeking just compensation for the lands patented to homesteaders under the 1910 Act. In that case, the Tribes themselves recognized Congress's plenary authority to open these lands. *Id.* at 366. The Indian Claims Commission held that by passage of the 1910 Act Congress had used its power to quiet the Tribes' possessory rights to this surplus land and that, therefore their rights to this land had been abrogated by the Act. Thus, the 1910 Act had the same effect as the acts considered in *Montana, Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989) and *South Dakota v. Bourland*, —— U.S. ——, 113 S.Ct. 2309 (1993), and the Tribes' reassertion of sovereign power over these lands is an attempt to exercise power the courts have previously found Congress had eliminated.

Rejecting this, the Circuit Court in essence held that in no case can a Tribe's assertion of authority based on the second *Montana* exception be summarily decided. Not only this holding but the continued viability of the second *Montana* exception as a basis for the exercise of tribal sovereign power beg for review and clarification by the Court. First, there appears no principled reason a summary proceeding could not be properly employed to dispose of a Tribe's assertion of authority. In this case, as the amici states pointed out, the Tribes made their showing and it failed to demonstrate the Tribes' regulations addressed in any way the alleged harm caused by Duncan Energy's activities. Brief of Amici States, at n.2.

9. Moreover, after *Brendale, supra,* and *Bourland, supra,* the meaning and substantive effect of the second *Montana* exception require clarification. The *Brendale* plurality asserted a proper showing under this exception gave rise not to sovereign authority in the Tribe but to a federal cause of action. *Id.* at 429-430. The concurrence did not address this. In *Bourland* the seven-member majority held that the alienation of land in fee abrogated tribal sovereign authority. *Bourland,* 113 S.Ct. at 2316, 2318, 2320, n.15. Yet the Court remanded the case, in part, for an analysis under this very exception. On remand, the Eighth Circuit, as noted by the ten amici States and RMOGA, was well aware of the unresolved status of this exception, declining to "consider [or] decide whether Justice White's *Brendale* opinion modified the second *Montana* exception for cases such as that presented here." *Bourland,* 39 F.3d 868, ——, n.4. Similarly, the Supreme Court of South Dakota noted on this issue that it is an open question whether a showing under the second *Montana* exception results in tribal sovereign authority or a cause of action: "*Montana* went on to note, *without deciding,* that a tribe may have other authority as well. . . ." *Red Fox v. Hettich,* 494 N.W.2d 638, 646 (1993). (Emphasis added.)

CONCLUSION

Uncertainty clearly exists as to the meaning of this exception to the general rule that Tribes do not have sovereign authority over nonmember activity on fee land. Duncan Energy respectfully submits the Court should review the issue and resolve it.

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